



THE INDIAN LAW REPO
CALCUTTA SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT CALCUTTA
BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THAT COURT AND FROM ALL
OTHER COURTS IN BRITISH INDIA (EXCEPT THE
COURT OF THE JUDICIAL COMMISSIONER
OF OUDH) NOT SUBJECT TO ANY
HIGH COURT.

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THE HIGH COURT.

1909.

— o:—

Chief Justice :

THE HON'BLE SIR LAWRENCE HUGH JENKINS, KT., K.C.I.

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(Resigned from the 12th March 1909).

„ MR. RICHARD HARINGTON (Acting Chief Justice).

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ERRATA.

- Page 1, line 11 from bottom, *for* "dependants" *read* "dependents".
- Page 72, line 10, *for* "Act V of 1908" *read* "Act V of 1898".
- Page 111, line 11, *for* "or" *read* "for".
- Page 138, line 3, *for* "Jytoi" *read* "Jyoti".
- Page 271, line 10, *for* "however" *read* "however,".
- Page 517, line 20, *for* "Walton" *read* "Watson".
- Page 708, line 24, *for* "Hegave" *read* "Hegade".
- Page 755, margin, *for* "Jah" *read* "Jha".
- Page 757, margin, *for* "Srimoan" *read* "Srimohan".
- Page 802, line 26, *for* "the R's" *read* "R's".
- Page 837, line 40, *insert* "that" *after* "contended".
- Page 840, line 28, *after* "respondents" *insert* comma.
- Page 841, line 21, *for* "in" *read* "on".
- Page 841, line 28, *omit* comma *after* "it".
- Page 968, line 9, *for* "Rampani" *read* "Rampini".
- Page 985, line 29, *for* "Atkin" *read* "Adkin".
- Page 1009, line 3, *for* "missing" *read* "mining".
- Page 1009, line 9, *omit* comma *after* "submitted" and *put* comma *after* "rightly".
- Page 1009, line 27, *for* "conveyed, cases" *read* "conveyed. Cases".

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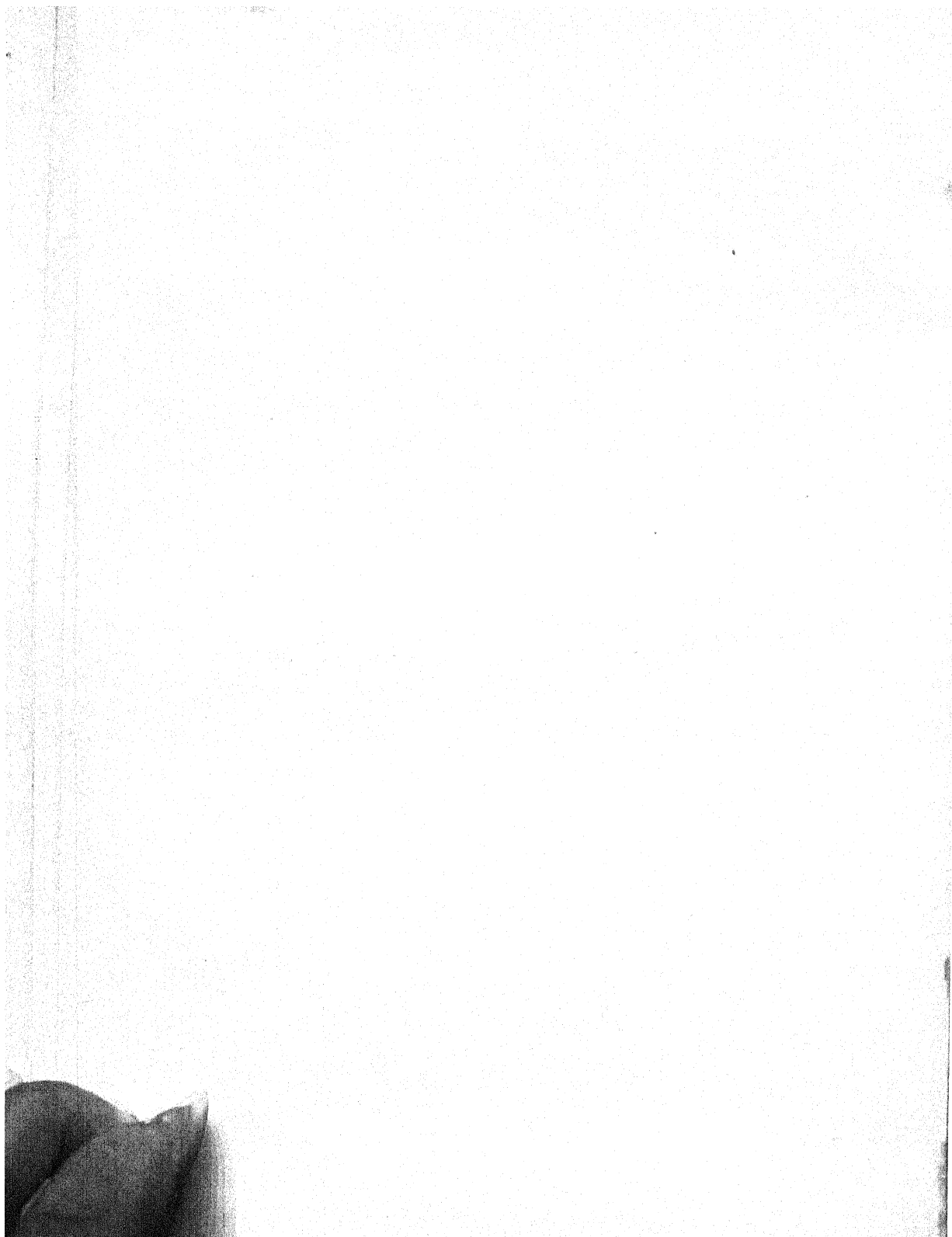


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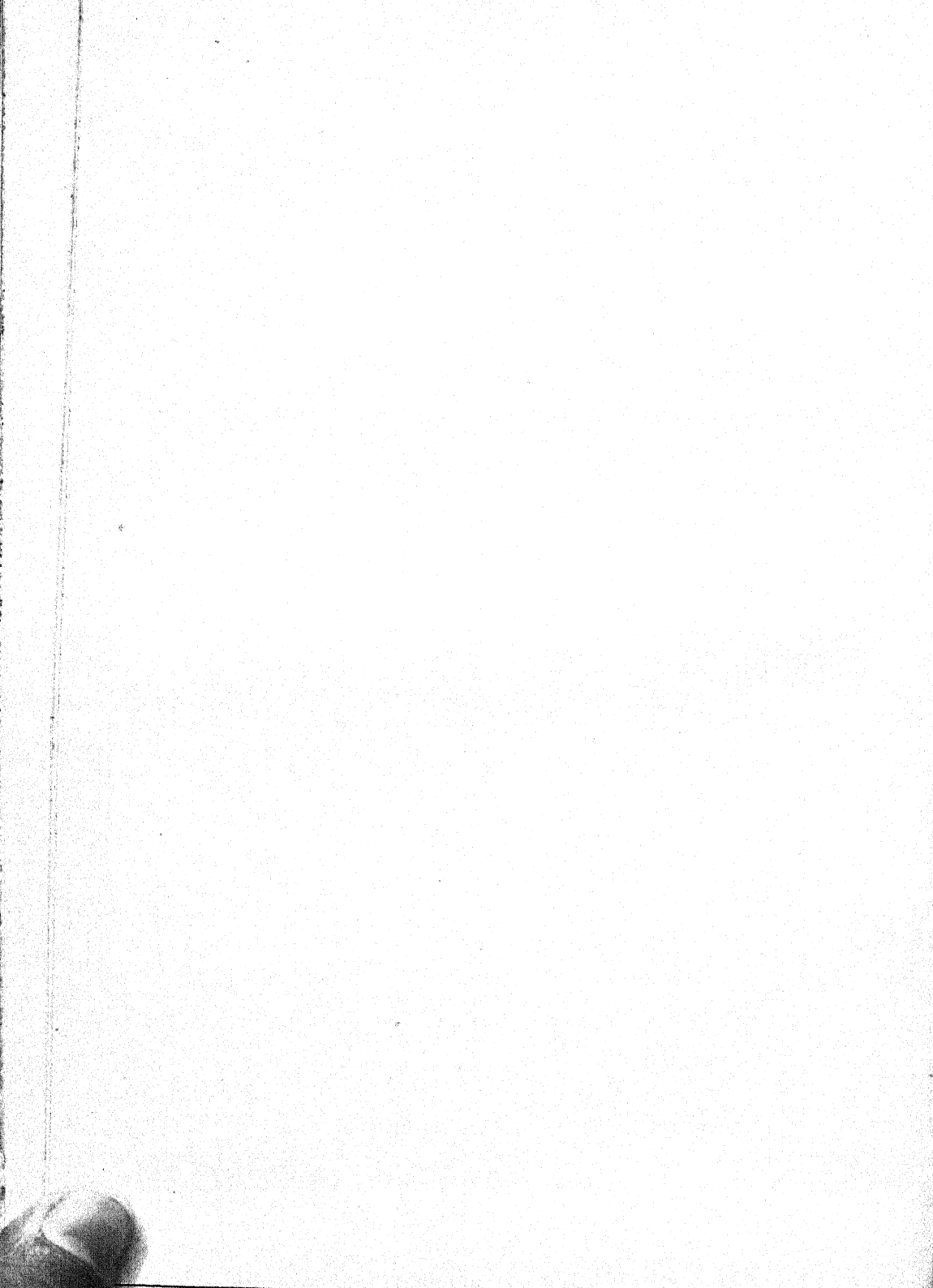
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Section 2 enacted that all such rights should be deemed to have been extinguished; and by s. 3 it was declared that all proprietors of such estates should be entitled to compensation.

The Government extended the above Regulation to certain areas under *jhum* cultivation belonging to the appellants, who and their predecessors in title had held them since 1837. In a suit brought against the Secretary of State for India in Council by the appellants they alleged that the land in dispute appertained to taluks, which had been settled with their predecessors in title at the time of the permanent settlement, and prayed for a declaration that it did not come within the operation of Regulation III of 1891.

Held, that as the Government were claiming to apply to lands, which had undoubtedly been long in the enjoyment of the predecessors in title of the appellants, a Regulation, which would have the effect of confiscating proprietary rights and giving compensation in exchange, it lay upon the Government to show that the facts of the case were such as to bring it within the operation of the Regulation.

Held, also, that the question whether the *jhum* lands lay within or without the limits of the settled estates was not a question of fact, on which the concurrent decisions of the Courts in India could be accepted as final. In a sense it was one of fact, but at every point in the process of reasoning considerations of law had to be regarded.

It was not disputed that the taluks held by the appellants had been settled with their predecessors in title at the permanent settlement, and that the profits of the *jhum* lands in dispute had then been brought into account in estimating the assets of the taluks, but the parties differed as to the reason why they had been so taken into account.

Held, that on the documentary evidence in the case there was, after such a lapse of time, not sufficient to show whether they had been so taken into account, because the *jhum* lands formed part of the settled estate as contended for by the appellants, or because they had been treated as assets accruing to the owners of the settled estate, but derived from land lying outside it as the Government contended. No confident conclusion, therefore, could be drawn from the evidence as to whether the disputed land was part of the settled estate, or was beyond its limits.

Held, however, that the possession and enjoyment of the disputed land by the appellants and their predecessors in title taken together with the instances in evidence in 1842, 1843, and 1855, in which it had been confirmed by the Government, was sufficient to prove their title. Since the last named date such possession and enjoyment had been continuous.

APPEAL from a judgment and decree (29th March 1904) of the High Court at Calcutta, which affirmed a judgment and decree (15th April 1899) of the Subordinate Judge of Sylhet.

The representatives of the plaintiff were the appellants to His Majesty in Council.

The suits, out of which these appeals arose, related to a hill tract of forest land (called *jhum*) situated in Pergunnah Langla in the Sylhet district, known as *mouzah* Puber Pahar, which the plaintiff contended was included in the villages permanently settled with him, and of a certain portion of which he was the sole owner, and of the rest part owner.

He claimed a twofold title to the disputed lands : firstly, a title derived from the permanent settlement, and secondly, a title by adverse possession for 60 years. His cause of action was stated to be that the Chief Commissioner of Assam under the authority vested in him by the Sylhet *Jhum* Regulation III of 1891 had by notification of 25th July 1891 directed that the Regulation should be extended and applied to the disputed tract of land ; that subsequently the Deputy Commissioner of Sylhet served a notice on the plaintiff to the like effect, and the Government Forest Officers by notice enjoined the public not to enter the land and cut and remove straw, bamboo and other forest produce therefrom, by which action of the Government the vested rights of the plaintiff and his co-sharers had been adversely affected.

The suit was brought on 13th April 1897 against the Secretary of State for India in Council and the plaintiff's co-sharers in a portion of the land for the establishment of his title ; and the plaint prayed for a declaration that the land in dispute did not come within the operation of Regulation III of 1891, and that the notification of the Chief Commissioner was inoperative.

The first defendant denied the plaintiff's title and possession ; did not admit that the disputed land appertained to the permanently settled land of the plaintiffs ; and alleged that the lands in dispute were outside the limits of the permanently settled taluks, and contended that they therefore came within the operation of Regulation III of 1891. He further contended that the right of *jhum* was not a right of property in land, but was an easement and that, if the plaintiff and other *mirasidars* had a *jhum* right over the land in dispute, that right had been extinguished by the Regulation.

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The only issues now material were (5th) whether the land in dispute appertained to the plaintiff's permanently settled land ? (6th) whether the land in dispute lies not within the limits of the permanently settled estates, and therefore comes within the *Jhum* Regulation ? and (7th) whether the plaintiff has acquired any title to the disputed land by adverse possession ; and whether the plaintiff is in possession of the same or not ; and whether he has the share he alleges in the portion, of which he is not sole owner, or not ?

The principal documentary evidence was that of the *mouza-wari* papers for 1208 B.S. (1801-1802 A.D.), which showed that the income derived from *mouzah* Paber Puhar was included in the collection of the villages permanently settled ; and of the *mouza-wari* papers for 1209 B.S. (1802-1803 A.D.) and 1236 B.S. (1829-1830 A.D.), which contained the following remarks :—

“ This quantity is estimated by sight only, but it may be less or more on enquiry being made in the Pergunnah. The *dastur* of *Jhum* cultivation is this : *Jhum* is not cultivated in one place every year. When land is found anywhere within these boundaries *Jhum* cultivation is made thereon, and after measurement and assessment the *Mirasidars* take the rest by apportionment according to their respective shares in the *Jhum* revenue at the time of the *hasbud* measurement. This hill is *Jhummai*.”

These statements referred to *mouzah* Paber Pahar, and purported to be a statement “ of *maha's* in Chuckla Sylhet, except the abadi and jungle lands of *taluks*, belonging to *mirasidars* according to the *hasbud* prepared by Mr. John Willis.” He was the Collector, who made the settlement, and from the above statements it appears that the land in dispute was included in the plaintiff's estate as *mirasidar* and was assessed to revenue as part of the estate.

From other documents it appeared that the plaintiff's title had on several occasions been affirmed. About 1840 the Government granted a lease of certain lands, not settled at the time of the permanent settlement, to Gun Singh Hazari and Gobind Singh Hazari. The lands leased were in the

neighbouring pergunnah Patharia. Under cover of the lease an attempt was made to realize rents from tenants cultivating in Puber Pahar. Ghour Ali Khan, the predecessor in title of the plaintiff, made objections, which were on 14th December 1842 decided in his favour by the Munsif of Huigajia, who held that "it was satisfactorily proved that the *jhum* lands on account of the disputed rents as stated by the plaintiffs, belong to the *jhummai taluks* possessed by the *mirasidars* of Langla Pergunnah." That finding was on appeal affirmed by the District Judge of Sylhet by judgment dated 20th May 1843.

After investigation, another order was made on 19th September 1848 excluding *mouzah* Puber Pahar, as being land permanently settled, from the area of land claimed by Government as land in regard to which a settlement had still to be made.

Later on further measurements were made of the Government lands, and in the maps prepared a large area of Puber Pahar was included. On objection taken the Revenue Commissioners of Dacca ordered the exclusion from the map of the area claimed as part of the estate of the plaintiff.

On 14th September 1855 the Board of Revenue again affirmed the plaintiff's title, and directed a refund of all monies wrongly collected by the Government in respect of the plaintiffs' land.

In 1860 some portion of Puber Pahar was again included in maps prepared of Government lands, and was on objection released by order of 28th February 1861.

The Subordinate Judge on the 5th issue held that the disputed land did not appertain to the permanently settled lands of the plaintiff.

On the 6th issue he said—

"From the preamble of the Regulation, it is evident that the Regulation does not apply to lands within the limits of the permanently settled estates, but applies to lands beyond the limits of those estates, upon which lands the proprietors of those estates carried on *Jhum* or shifting cultivation, the income derived from such cultivation having formed part of the estimated assets, which formed the basis for assessment of revenue of the permanently settled estates. The first question for determination, therefore, is whether

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the land in dispute is within, or is beyond, the limits of the permanently settled estates.

"The best evidence on the point was the *hasbud* measurement papers prepared by Mr. Willis, the then Collector of Sylhet, on the basis of which the decennial settlements were made. These papers clearly defined the boundaries of the estates permanently settled. If the land in dispute had been included by that measurement in the land of the permanently settled estates, the *hasbud* papers would have shown the fact. But the plaintiff has produced no such papers in support of his case. It must be observed that the defendant denied that the land in dispute was included in that measurement. It was not possible for him to prove the negative. The plaintiff, who asserted the affirmative, should have proved it. It might be said that the Government, being the custodian of the papers, should have produced all the *hasbud* papers to show that they did not include the disputed land. It must be remarked here that the papers were not in the shape of a bound volume, but consisted of separate small bundles, the papers relating to one *mouzah* forming a separate part. Such being the case, even if all the available papers had been produced, it might still be said that the papers relating to the disputed land had been withheld. There is no hint even that any *hasbud* paper relating to the disputed land ever existed. Under these circumstances, it is but fair to presume that the disputed land was not included in the *hasbud* measurement.

"The *mouzawari* statement (Ex. A) is an abridged compilation from the *hasbud* papers. Though it gives no boundaries it gives the names of all the villages contained in each of the estates permanently settled. In the plaint the plaintiff states that the disputed land is of *mouzah* (village) Puber Pahar (eastern hill). The *mouzawari* statement shows that no such village as Puber Pahar was among the villages contained by the several taluks claimed by the plaintiff. This statement shows that certain incomes were placed against *ꠠꠠ ꠠꠠ* (Mung Jhum); from this it is contended that the words Mung Jhum meant *mahal* Jhum or *mouzah* Jhum. I think this contention is not tenable. If *Jhum* had been a *mouzah*, it would have been preceded by the letter *ꠠꠠ* (mow) as in the case of other *mouzahts*, and would have come together with the other *mouzahts*, and not have been shown underneath on the paper. It appears that after stating the assets or incomes derived from the *mouzahts*, or villages contained in the *taluk*, the income of *Mung Jhum* is shown underneath the sum total. From this it is quite evident that *Mung Jhum* is not *mouzah* Jhum, but is the abbreviation of *mahal* Jhum. The full expression *mahal* Jhum is to be found in several places. The word *mahal* is here used not in the sense of an estate; for the statement from its very nature was the description of an estate, the number and name of which are given in columns 1 and 2 respectively; and certainly the assets of any other estate could not be included in the assets of that estate. From these considerations, I am clearly of opinion that the word *ꠠꠠ* or Mung is used in the sense of source of income. For the use of the word in that sense, *vide* Field's Introduction to Regulations, Ed. XXV (1875), page 41. On reading the *mouzawari* statement mentioned above, I clearly think that the statement after showing the assets of the

mouzahs contained in the *taluk*, showed the assets or income derived from *jhum* cultivation, the statement being silent as to the area in respect of which such income was derived and such area necessarily remaining undefined. This was exactly the thing contemplated in the preamble of the Regulation. This statement does not at all show that the disputed land is within the limits of the permanently settled estates. So far as it goes it shows that this land is beyond the limits of those estates."

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From the measurements made in 1209 B.S. (1802-1803 A.D.) and 1236 B.S. (1829-1830 A.D.) and from the other documentary evidence mentioned above the Subordinate Judge held it to be shown that the land in suit was not within the limits of the permanently settled lands of the plaintiff. On the 7th issue he held that the later possession of the plaintiff and his predecessors was sufficiently proved : but that the evidence was not sufficient to show their absolute possession for 60 years. He was of opinion that the nature of the acts of possession indicated a casual interest and not an absolute interest in the land, which could by prescription mature into ownership. No title therefore had been proved by adverse possession.

On these findings the Subordinate Judge dismissed the suit.

On appeal (in which the present appellants (Mahomed Ali Haidar Khan and Mahomed Ali Asgar Khan) were put on the record in place of the original plaintiff (Mahomed Ali Amjad Khan), the High Court (SIR H. T. PRINSEP and HARRINGTON, J J.) affirmed the Subordinate Judge's decision.

The material portion of their judgment was as follows :—

Plaintiff's case is that, inasmuch as the lands in suit formed portion of the lands permanently settled and made into the estates mentioned in schedules IV and V, their assets as *jhum* lands being taken into account in determining the revenue payable, they are not within the Regulation, which deals with lands beyond the limits of permanently settled estates.

Jhum lands are lands in wild and jungly tracts in the Sylhet Frontier, which were never brought under settlement by the Revenue authorities, but were left waste to be occupied by migratory cultivators, who after a time abandoned them and moved on to other similar lands with greater advantages. The proprietors of neighbouring estates seem to have taken rents or forest dues from these persons. Any rights so acquired either by the cultivators or by those, who took rents or dues from them, were of a very indefinite and transitory character, and in the present case it is not shown that they were exercised

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in such a manner as to give the plaintiff, as claimed in the alternative, a title to the lands in suit by reason of possession for a period exceeding twelve years.

After reading the preamble and sections 2 and 3 of the Regulation III of 1891 the judgment proceeded—

The main questions for consideration, therefore, are whether by the proceedings in the permanent settlement of the estates mentioned in schedules IV and V, the lands in suit were included so as to form portions of those estates or whether beyond the limits of those estates the assets merely were taken into account for purposes of assessment of Government Revenue, but not so as to confer any title to the lands; in other words, whether the lands as such came within the terms of the Regulation.

In making a settlement of an estate it is the duty of a Revenue Officer to ascertain the assets realized by the proprietor in the shape of rents, &c., from the lands forming portion of that estate and to assess the Government revenue on the results. It appears from the evidence before us corroborated by the terms of the preamble of the Regulation, that when the permanent settlement of this part of the country was made, the income then derived from various rights was considered as an asset of the estate and taken into account in assessing the Government revenue. But it is equally clear that the rents paid for the occupation of land cultivated as *ghum* as well as such dues as were derived from cutting timber or otherwise, which may roughly be described as forest rights were variable and it could not be said that any particular proprietor received such rents or dues on account of any particular tract of country for any considerable and continuous period of time. Even at the present time, the evidence fails to show this. The lands were waste and unoccupied and had not been made liable to the payment of Government revenue and under the custom of the country they were left open to the sparse uncivilized tribes, who lived on the frontier, to use them as they thought proper. Admittedly these people were never regularly settled on any particular lands. They cleared jungles and used the timber and the cultivated lands as they thought proper, until they found that their labour could be more profitably directed to other lands and they then abandoned their former holdings and occupied these new lands. Meanwhile the proprietors of lands under settlement with Government took advantage of their superior position and influence and took rents and the dues realized by these persons from those occupying lands under the *ghum* custom were taken into account in assessing the Government revenue and the Government abstained from attempting to make any regular settlement in regard to the payment of revenue on account of *ghum* lands. There is nothing to show an admission by Government of any title to the large tract of waste lands still unoccupied save by casual acts of cultivation, cutting timber and so forth. How far the inclusion of such assets would give any title to the lands, for which rents were then paid, is another question. But if the lands were beyond the limits of the estates under permanent settlement, it is clear that they come within the Regulation, for it is to such lands that the Regulation is

expressly directed. This is shown by the preamble. All rights over such lands were declared to be extinguished, compensation being given for their loss and it was further declared that no claim on the ground of such rights shall be entertained in any such proceeding.

On the first issue tried, the Subordinate Judge found that the lands in dispute were not included within the boundaries of the permanently settled estates, because the plaintiff had failed to show that they were within the *hasbud* papers, that is, the statement of the assets of the property, on which the settlement was made. The Subordinate Judge placed the burden of proof on the plaintiff to show that the lands in suit were so included, because the defendant Government denied this and he seems to doubt whether such papers ever existed. We must, however, take it that the settlement must have been made on some such basis. The case set up by the plaintiff is that, inasmuch as the assets derived by the proprietors of the *taluks* under settlement from *jhum* lands were taken into account with the assets of the *taluks* in determining the amount of revenue payable, these *jhum* lands became a portion of the estate and were consequently within its limits and thus beyond the operation of the Regulation. That view of the present suit will be presently considered.

The permanent settlement is said to have been made by Mr. Willis, the Collector of the district, about the commencement of the late century. We have a copy of an extract of the *mouzawari* Register bearing date 1802-1803, in which reference is made to the *hasbud* prepared by him and a similar document bearing date 1829-1830 also refers to this *hasbud*. Both of these documents relate to *mouzah* Puber Pahar, *pergunnah* Langla. The *hasbud*, which should be amongst the records of Government, is not forthcoming. We are satisfied that after proper enquiry it cannot be found and we must consequently consider the evidence on the record without it. It is not at all clear how the *hasbud* would throw additional light on their suit. Admittedly the assets received by the proprietors of the *taluks* under settlements were taken into account in assessing the amount of revenue payable, but that would not necessarily make these lands "within the limits of the estate" so as to place them beyond the operation of the regulation, and there is no reason to suppose that the *hasbud* would give the boundaries of the new estate formed on settlement. It would give the details on which the settlement of revenue was made, and these are sufficiently clear from the evidence on the record. The *mouzawari* Registers profess to describe the *mahals* belonging to the *mirasidars*, excepting the *abadi* and jungle lands of these *taluks*, and they give certain boundaries.

The earlier register is mutilated, but we may take it that they agree, and after describing the boundaries it is stated, "within the boundaries of these plots there are *jhum* cultivated lands and jungle lands appertaining to jungles, which were measured at the time of the *hasbud* measurement and included in *taluks*. Minus these the remaining 30,000 *vals* of Pahar are unmeasured, but estimated by guess." In the description of the property it is stated, "this hill is *jhummai*." But it may be observed that there is no specification of the exact area or the Government revenue assessed. Moreover from the casual

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occupation of *jhum* lands, we cannot regard the action of the Revenue Officers in taking the assets derived from the *jhum* lands into account as being more than an assertion by them that they were receivable by the *talukdars* subject to the right of the paramount power of the Government, and were an item in the account on which the assessment of Government revenue should be determined. We cannot regard these as an admission of the right of the *talukdars* to the *jhum* lands as forming portion of the *taluk* under settlement or to be more than that the amount so received by them represented fairly what they might receive in exercise of the right to take rents and dues from those occupying or using temporarily *jhum* lands.

We have been next referred to a judgment of the Mansif in 1842 in a suit to recover damages for illegal distraint brought by certain cultivators of *jhum* lands against the *zamindars*, in which the lands were found to be within the *jhummai taluks* of *pergunnah* Langla possessed by the *mirasidars*. Great stress is laid on the use of the term *jhummai* and it is contended that from this we should hold that the lands had been assessed with Government revenue as portions of the estates permanently settled. (This judgment is no evidence against Government, who was no party to it.) But this does not necessarily follow. The term *jhummai* is used after describing the rights in *jhum* lands and it may be equally used to mean lands paying rents to the neighbouring *zamindars* under the *jhum* custom in force. So again, as found in the *rahodari* of the Collector of February 20th, 1861, on objection taken to the assessment with Government revenue of certain lands as *jhum* lands, they are described as *jhum jhummai* lands appertaining to the decennially settled *taluks* of *pergunnah* Langla, but that again does not necessarily show that they formed portions of those permanently settled *taluks*. That is to say, that those lands fell within the boundaries of those *taluks*. They are described as appertaining to them in the sense that their assets as *jhum* lands had been taken into account in the settlement of the revenue payable. In this sense they are not necessarily excluded from the terms of the Regulation. That would depend upon whether the *jhum* lands are within the limits of the settled estates.

We have been next referred to a considerable number of *kabuliats* executed by occupiers of *jhum* lands, some for payment of rent and others for payment of dues on account of what may be termed forest rights, in which the lands have been described as *jhum jhummai* lands of decennially settled *taluks*, and our attention has been directed to some of these *kabuliats*, which further described the lands as in *mouzah* Puber Pahar. But these again do not prove that the lands fell within the boundaries of the permanently settled estates. They merely show that the *zamindars* have acted in a manner such as is described by the Regulation in respect to persons occupying lands on the *jhum* system and not that any of the lands so dealt with are within permanently settled estates. Any statement to that effect that may be found in some of these *kabuliats* is no evidence of that.

"There is some other evidence in *mouzawari* papers purporting to show the details of the assessments of Government revenue on these estates by describing the *mouzahs*, &c., and it is contended that these show that *jhum* lands were included not only in the assessment of the revenue but formed portions of the estates under settlement. But, in considering this evidence, it must be borne in mind that it cannot be denied that, when the settlements were made, the assets of *jhum* lands outside the estates were taken into account, not necessarily because the lands were included in the estates, but because the proprietors of the estates under the prevailing custom used to take rent, &c., from those occupying *jhum* lands in the vast and wild tracts lying beyond their estates. The Revenue Officers apparently considered that such assets should be made liable to the Government demand, although the *jhum* lands were not under settlement. This is the cause of the complication, which has arisen. It has led to the passing of the Regulation and it has also given rise to the difficulties in this suit in distinguishing lands inside and outside the estate, because ordinarily the assessment of Government revenue on the assets realized by the person in possession of the lands under settlement would be only on assets derived from the lands under settlement. The *Mouzawari* Registers amongst the *mouzahs* forming portions of the *taluks* under Settlement do contain entries of *mouzah Jhum*. But it is remarkable that whereas, in respect of other *mouzahs* the quantity of land under cultivation and waste are given, in respect of *mouzah Jhum* only the cultivated area is stated. This seems to show that, however these entries may be regarded, *mouzah Jhum* did not include any definite area or tract of country which, as in the case of other *mouzahs*, naturally would include lands both under cultivation and waste. This is of great significance having regard to the nature of lands held as *jhum*, for, as already stated, lands so held were variable, as there was no certainty that they would be so held after the crops grown on them were gathered in. They might be occupied or abandoned with absolute freedom.

"A *mouzah* described as *jhum* would not be permanently settled for the assessment in respect to any definite and certain area; the inclusion of assets so realized from *jhum* lands would rather seem to indicate the amount at that time realized by the proprietor of the property under settlement as an appendage to that property, not necessarily as forming part of it, but as an asset realized by the *talukdar*, of which Government was entitled to a proportionate share in the settlement. The fact that these lands were described as *jhum* and were so added as appertaining to the *taluk* does not necessarily show that they were included as portions of the estate under settlement. To establish that it should be shown that these lands were within the limits of that estate. So far, therefore, in the determination of the question, the evidence relating to the settlement leaves the matter doubtful on which this suit depends.

"When the Revenue survey took place the disputed lands were designated as *mouzah Jhum* and were included as part of the *pergunnah* Langla, but this seems to have been cancelled and the lands were afterwards separately shown as outside this *pergunnah* and they were entered in a map described as the Frontier Circuit. In this map some lands are shown as occupied and apparently

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under cultivation, while the disputed lands were not so distinguished. They lie either on the slopes of some hills or between or beyond them. Some stress is laid on an entry in this map that the watershed of Hararganj Tilla was the boundary line between the *ghum* village and the decennially settled *ghum* lands. But this, as observed by the Subordinate Judge, is inconsistent with the map itself. The explanation, which he gives of this, seems to account for it. He attributes this to the fact that this item follows the *thak* map as originally made, and that the subsequent correction of the *thak* map in this respect, apparently on some system taken and admitted, was not given effect to, the means being overlooked. It would be impossible in this state of things to attach that weight to the memo. which the plaintiff claims that it should receive, and to hold that on the boundary thus declared the *ghum* lands form a portion of the permanently settled lands of Langla.

"So far, therefore, the evidence does not establish the fact that the *ghum* lands now in suit were within the decennially settled *taluks* or any thing more than that their assets formed part of the basis, on which the assessment of Government revenue was fixed, and, as already stated, this would not in itself entitle the plaintiff to hold the lands as portions of those permanently settled *taluks*. But there is some other evidence tending to show how the Revenue Officers have dealt with these lands. We find that they were made part of some *ilam* lands under settlement, but that, on objection raised by the plaintiff that they were *ghum* lands appertaining to the decennially settled lands of Langla and not *ilam* lands, they were released in 1860. In these proceedings, reference is made to some earlier proceedings, which are not in evidence. But there is nothing in any of these proceedings to show that at any time any question was raised and considered except whether they were or were not *ilam* lands and as such liable to settlement of Government revenue. They were excluded from liability to settlement, not because they had been already permanently settled or formed a portion of permanently settled estates, but because they were *ghum ghummai* lands appertaining to permanently settled *taluks* and not *ilam* lands, which are lands of a different description, not held under *ghum* system, but liable to assessment on payment of Government revenue. Some explanation is given of the course thus taken by the Revenue Officers by the orders passed by the Board of Revenue in 1855 on the objection taken by Ghous Ali, who is said to have been one of the predecessors of the plaintiff.

"The proceedings of the local authorities in reference to this matter are not in evidence. The letter of the Board of Revenue, which is on the record, is the only evidence of the proceedings, which were then taken. It shows that on objection taken by Ghous Ali Khan to the assessment of revenue on certain lands for which they recovered rents, &c., under the former system, and from which were assessed as part of some *ilam* lands, these lands had been released settlement on the ground they were not *ilam* lands, but *ghum ghummai* lands. We have no further information on this subject, for none of these proceedings nor his objections have been given in evidence. We have, however, the orders passed by the Board of Revenue in September 1855 on the further claim of

Ghous Ali Khan for a refund of collections made by the Revenue authorities, while these lands were under attachment as *ilam* lands, apparently because no one would accept the settlement made. The claim for a refund was on the ground that these lands had been released from assessment as *ilam* lands, and it would seem that for this reason the claim was allowed. In dealing with this matter, the Board of Revenue stated that the question involved is this—'Were the 6409 *kulbas* of land in the Eastern hill of pergunnah Langla included in the permanent settlement as alleged by Ghous Ali Khan and others or did that arrangement only cover 83 *kulbas*, leaving the remainder open to a settlement as *ilam*,' evidently holding that any lands assessed at the time of the permanent settlement as *jhum* lands could not be assessed as *ilam* lands. The exact ground of their decision in favour of Ghous Ali Khan is not clear from the proceedings of the Collector and Commissioner, which are referred to and are not before us, but it would seem that this claim was admitted, because the lands were *jhum jhummai*.

"The Board of Revenue, however, observe that '*jhum* lands are variable, because the same lands are not cultivated every year and therefore they could hardly have been fixed by measurement at the time of the permanent settlement, for the number of *kulbas* then under cultivation would not accurately represent the amount of cultivation in all succeeding years nor under the peculiarity already stated' (in reference to other lands) 'could the cultivated be viewed as restricted to the identical lands then measured,' and the Board of Revenue points to the *mouazawari* papers of some years as showing variations in the quantity of *jhum* lands entered as under cultivation.

"This in our opinion illustrates the position of *jhum* lands in reference to the settlement proceedings. They were not regarded as *ilam* lands subject to settlement and, at the same time, when it was observed that *jhum* lands were included in the permanent settlement, it was pointed out that any definite area could not be accepted as representing such lands, because there was no certainty that they would remain under cultivation and as such liable to rent to the landlord. The Board of Revenue do not express themselves distinctly in declaring the exact position of *jhum* lands in reference to the permanent settlement made by Mr. Willis. From the reference to the indefinite area owing to the peculiarity of *jhum* lands, it would be either that all *jhum* lands were included in the permanent settlement (and we know that this was not so), or that certain lands then held as *jhum* and yielding rent were so included. But then the Board points out that these lands 'could hardly have been fixed by measurement,' which we should understand to mean that in the opinion of the Revenue Board they were not measured. If so, the conclusion must be stated in the Regulation that the assets of such lands were included, not the lands themselves, though for this reason they may have been regarded as appertaining to the settled estates. Still, as already stated, we cannot hold from this that such *jhum* lands were part of these *taluks*, that is, that they were included within the limits of those estates. To hold that they were so included is very different from holding that these lands were an appendage to the estate, for, in the latter case, it may well be that the Revenue Officers,

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while not making the lands part of the estate, held that the proprietors by receiving rents, &c., from the *jhum* lands had rendered themselves liable *protanto* to pay a proportionate increase of revenue. This, in our opinion, properly represents what actually took place. The Subordinate Judge has, we think, correctly expressed the grounds, upon which the Board of Revenue acted, that is, so long as the *jhum* right of the *talukdars* continued in the lands, they could not be properly treated as *Hum* lands and liable to assessment as such. But the present position is now changed by the Regulation. Unless it can be shown that any *jhum* lands were included in the limits of the *taluk* permanently settled, the rights of the *talukdars* in respect of rents or dues derived from them are extinguished and the *talukdars* are entitled to receive compensation for the same.

"On these considerations we agree with the Subordinate Judge that he has failed to prove that the lands in suit lie within the boundaries of his permanently settled *taluk* and we accordingly dismiss the appeal with costs."

ON THIS APPEAL.

Sir R. Finlay K.C. and *De Gruyter K.C.* for the appellants contended that the lands in dispute appertained to their permanently settled estates, and that therefore they were lands to which Regulation III of 1891 did not apply. The word "*jhum*" meant a hill or forest village, and in such a village the cultivation would naturally be shifting, and there was nothing in the word itself, or in its use, to indicate that a hill or forest village could not form part of the Zemindar's estate, to which his title was recognized at the permanent settlement. The fact, which was shown by the *mouzarari* papers of 1801-1802, that the income derived by the owners of the permanently settled estates from the lands under *jhum* cultivation was taken into account with the income of the settled estates in determining the amount of revenue payable, showed that the *jhum* lands were considered a portion of, as being within the limits of, the settled estates. Bengal Regulations I of 1793, section 10, and VIII of 1793, sections 23-25, were referred to to show that only assets arising out of the settled estate itself could be taken into account in settling the revenue of an estate; and that therefore, as the income of the *jhum* lands had been taken into account, the presumption was that such lands belonged to the estate, the revenue of which had been so settled. Reference was also made to the *Mouzarari* Papers 1208 B.S. (1801-1802 A.D.), 1209 B.S. (1802-1803 A.D.)

and 1236 B.S. (1829-1830 A.D.); Field's Regulations, Ed. 1875, Introduction, page 41, as to the meaning of the word "*Mahal*," which was there defined as "an estate; land separately assessed with Government revenue. It is also used in a figurative sense of source of revenue not derived from land, e.g., the abkari or excise *mahal*," Assam Land Revenue Manual by Gait, Ed. 1896, Sylhet Province, pages CXXVIII, CXXIX, CXXXII, CXXXIV, and CXXXVII: and the 5th Report of the Select Committee on the affairs of the East India Company, Madras, Ed. 1883, Vol. I, pages 14, 18, 21—23, 130, 139, 146, 147, 150, 568, 569, 571 resolution (5), 580, 585, 592, 609, 611, 613, 616, 630.

It was also contended that the onus was on the respondent, the Secretary of State for India in Council, to show that Regulation III of 1891 was applicable to the lands in dispute.

On the question of title the documents referred to in the statement of the facts of the case (1) were relied upon and it was contended that the evidence afforded thereby of the possession and enjoyment of the lands in dispute by the appellants and their predecessors was sufficient proof of their title. Since 1855 at any rate the possession and enjoyment of the lands by them had been continuous.

Cohen K.C. and *Ross* for the respondent, the Secretary of State for India in Council, contended that the appellants had failed to prove that the lands in dispute were included in their permanently settled estate. The onus of proof on this point had been rightly placed on the appellants, and moreover both the Courts in India had concurrently decided that they were not so included. It was true that the assets of the *ghum* lands were taken into account in estimating the assets of the Settled Estate for the purpose of ascertaining the revenue payable; but they were so taken into account as assets accruing to the owners, but derived, not from the Settled Estate, but from land lying outside it. It was submitted that the documentary evidence on the record taken as a whole clearly showed that the

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officers, who effected the permanent settlements of these estates, included, for the purposes of assessment among the assets of those estates under the name of *ghum*, the income then derived by the proprietors of those estates from shifting cultivation carried on by the proprietors or their defendants beyond the limits of those estates; and further that the areas of such cultivation were altogether undefined, and varied in different years. The lands so undefined could not be and were not included in the settled areas; and it was also submitted that this state of things was exactly what the Legislature contemplated, when Regulation III of 1891 was passed. See the preamble of the Regulation; Statute 33 Viet., C. 3, as to the effect of Regulations passed under it as was Regulation III of 1891; and the Assam District Gazetteer, "Sylhet," Vol. II, page 212.

As to the question of title it was contended that the appellants and their predecessors had not the entire interest in the land in dispute, but only enjoyed a partial and casual interest, and such rights as they exercised over it was not sufficient to prove the title they claimed as absolute owners; nor was the long adverse possession they set up, which had been decided against them.

De Gruyther K.C. in reply.

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The judgment of their Lordships was delivered by—

SIR ARTHUR WILSON. This is an appeal against a judgment and decree of the High Court of Calcutta, dated the 29th March 1904, which affirmed the judgment and decree of the Subordinate Judge of Sylhet, dated the 15th April 1899.

The question raised upon the appeal, is whether Regulation III of 1891, issued under the authority of Act 33 Viet., C. 3, can properly be applied in the case of certain lands known by the name of Puber Pahar.

The Regulation in question begins with a most useful preamble, which recites as follows:—

"Whereas the officers, who effected the permanent settlements of certain estates in the district of Sylhet included, for the purposes of assessment, among the assets of those estates under the designation of *ghum*, the

income then derived by the proprietors of those estates from shifting cultivation carried on by them or their dependants beyond the limits of those estates, and from tolls levied by them on forest-produce cut, gathered or enjoyed in places beyond the limits of those estates ;

" And whereas, inasmuch as the said cultivation and the operations of those who cut, gathered or enjoyed the said forest-produce shifted from year to year over immense and altogether undefined areas, the tracts of land, over which they extended, were not specified at the time of the settlement, and, in consequence of this, rights of various, and in some cases vague, descriptions are from time to time asserted by the said proprietors over immense and undefined areas ;

" And whereas it is thus impossible for any person to obtain a safe and clear title to land in those areas and the extension of cultivation is, in consequence, impeded ;

" And whereas it is expedient that the rights, if any, corresponding to the said *jhum* assets should be commuted."

Section 2 enacts that :—

" All rights . . in respect of which *jhum* . . assets were assessed in any permanent settlement of land, or which have been at any time acquired by virtue of or under cover of such assessment shall be deemed to have been extinguished."

And section 3 declares that all proprietors of such estates shall be entitled to compensation.

The nature of *jhum* cultivation is explained in an early official document relating to the hill lands in question :—

" The dastur of *jhum* cultivation is this : *jhum* is not cultivated in one place every year. When land is found anywhere within these boundaries *jhum* cultivation is made thereon, and after measurement and assessment the *Mirasdars* take the rest by apportionment according to their respective shares in the *jhum* revenue at the time of the *hasbud* measurement."

And that description seems to be correct to the present day.

After the passing of the Regulation the Government of Assam whose jurisdiction included Sy'het, issued and published orders in due course, extending the Regulation to the areas in question with others.

The question, therefore, raised in the case and discussed on this appeal is, whether the Regulation can be put in force with reference to the lands, to which it is sought to apply it. Those lands have undoubtedly been long in the enjoyment (such enjoyment as is practically possible under the circumstances

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of the case) of the appellants' predecessors in title. The Government claims to apply to these lands a Regulation, which would have the effect of confiscating proprietary rights, and giving compensation in exchange. Under these conditions their Lordships think it clear that it lies upon the Government to show that the facts of the case are such as to bring it within the operation of the Regulation, in other words, that the present case is one in which, at the Permanent Settlement, in making settlement of certain *taluks* with the appellants' predecessors in title, the officers of Government included, for the purposes of assessment, among the assets of those *taluks* the income derived by their owners from *jhum* cultivation carried on beyond the limits of the settled estate.

That the *taluks* now held by the appellants were settled at the Permanent Settlement is beyond dispute, and that in estimating the assets of those *taluks* the profits of the present *jhum* lands were then brought into account is also beyond dispute. But according to the appellants those profits were taken into account because the *jhum* lands formed part of the settled estate: while, according to the other side, the *jhum* land profits were taken into account as assets accruing to the owners of the settled estate, but derived from lands lying outside it. The question is, which of these views is to be accepted.

It was contended on behalf of the Secretary of State that the question, whether the *jhum* lands lay within or without the limits of the settled estates, was a question of fact, and that their Lordships should accept the concurrent findings of the two Courts in India. This contention their Lordships are unable to accept. In a sense the question is one of fact: but at every point in the process of reasoning considerations of law have to be regarded.

It was contended on the other side that, under the Regulations in force at the time of the Permanent Settlement, no assets could lawfully be taken into account in settling the *jama* of an estate, except those arising out of the estate itself; and that this consideration established a very strong presumption

that in any individual case the course in accordance with law had been followed. But this contention was met, and in their Lordships' opinion effectively met, by a reference to the preamble of the Regulation under consideration. That preamble shows that the course said to have been impossible was in fact followed, rightly or wrongly, and followed in a number of cases sufficient to render legislation desirable. It remains, however, to consider, in each case that comes before the Courts, whether the facts bring the case within the operation of the Regulation.

The *taluks*, in which the lands in question are said to have been included, were, no doubt, settled at the decennial settlement, and that settlement was in due course made permanent. But as might be expected after so great a lapse of time, little now survives of the original official papers, and what does survive is not very easy to construe.

The most important of the early documents are certain *mouzawari* papers from 1801-02 onwards. These show clearly that, in assessing the *taluks*, the *jhum* assets were taken into account. But this, as has been shown, is a neutral fact consistent with the case of either party. Beyond this it is difficult to carry the effect of those papers.

Those papers were examined in detail by Counsel upon both sides on the argument of the appeal. It appears to their Lordships unnecessary to repeat that examination. It is enough to say that there are circumstances favourable to one side and circumstances favourable to the other, but that no confident conclusion could be drawn from these papers, either one way or the other.

Reliance was also placed upon certain *thakbast* maps, but these are equally inconclusive.

The only other matter, which remains to be considered, is the evidence as to possession and enjoyment of the lands in question on the part of the plaintiff and those, who preceded him. In the Courts in India the plaintiff sought to establish a title by adverse possession for sixty years. In this he was held to have failed, and on the argument of the appeal no such case

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was contended for, but the evidence of possession and enjoyment was relied upon as proof of title.

Regarded in this light, that evidence is important and it all points one way. It was shown that from as early as 1837 the appellants' predecessors in title received kabuliyats from persons carrying on *jhum* cultivation on the lands in question.

In 1842 and 1843 those predecessors in title succeeded in defeating an attempt to exercise rights over these lands on the part of the persons interested in an adjoining *mouzah*.

On several occasions in subsequent years the appellants' predecessors successfully resisted proposals on the part of Revenue Officers of Government to settle portions of these hill lands as *ilam* lands open for settlement. The most important instance was one that terminated in an order passed by the Board of Revenue (the highest Revenue Authority in the Province) dated the 14th September 1855. It had been proposed to offer for settlement a portion of the lands now in suit as *ilam* lands. This was objected to by the appellants' predecessors. The Collector overruled the objection, but the Board of Revenue, concurring with the Commissioner, reversed that finding, and on the ground, as their Lordships understand it, that the lands were included in the Permanent Settlement. After that the possession and enjoyment of the appellants and those, through whom they claim, seem to have been continuous.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the decrees of the Courts in India should be set aside with costs, and a decree made granting the appellants the declaration asked for by the plaint. The respondent, the Secretary of State, will pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellants : *T. L. Wilson & Co.*

Solicitors for the respondent, the Secretary of State for India :
The Solicitor, India Office.

J. V. W.

ORIGINAL CIVIL.

Before Mr. Justice Woodroffe.

In the matter of WOOZATUNNESSA BIBEE.*

1908

August 25.

Mahomedan Law—Wakf property—Jurisdiction.

Under Mahomedan Law, the High Court has jurisdiction to authorise dealings with *wakf* property.

Shama Churn Roy v. Abdul Kabeer (1) followed.

ORIGINAL SUIT.

THIS was an application by a *mutwalli* under Act XXVII of 1866 and Act XXVIII of 1866 for the sanction of the Court to grant a lease of certain premises, which were the subject of a *wakf*, created by a *wakfnamah*, dated July 19th, 1905.

On July 19th, 1895, one Shamsul Ulama Moulvie Mahomed Illahallad, a Sunni Mahomedan of the Hanafi sect, who had established a mosque at No. 42, Moonshee Alimuddin's Street, in Calcutta, executed a *wakfnamah*, whereby he dedicated certain premises, including Nos. 13, 14, 20, Holwell's Lane, and No. 105, Old Boytokhana Bazar Road, within the jurisdiction of this Court, as also certain premises outside the jurisdiction of this Court, to the purposes of this mosque. By the *wakfnamah* he appointed himself the first *mutwalli* of the trust and directed that, after his death, his widows should be *mutwallis* in succession in the order of the dates of their respective marriages.

Moulvie Mahomed died intestate on April 24th, 1901, leaving three widows, the petitioner, Mussamut Woozatunnessa Bibee, a Sunni Mahomedan of the Hanafi sect, the first, and two others, a daughter and a sister, his heirs under the Hanafi School of Mahomedan Law. The petitioner as the eldest widow came into possession of the estate of the deceased, and on March 19th, 1904, obtained letters of administration of

* Ordinary Original Civil Jurisdiction.

(1) (1898) 3 C. W. N. 158.

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the property and credits of the deceased. The premises Nos. 13, 14 and 20, Holwell's Lane, and No. 105, Old Boytokhana Bazar Road, dedicated to the *wakf*, were covered with tiled huts and yielded a monthly rental of Rs. 90-8.

On March 8th, 1908, the petitioner, with the object of disposing of the trust property in a more beneficial manner, agreed to grant a lease of these premises, for a period of 30 years, at a rental of Rs. 130 per month subject to the sanction of this Court. It was the grant of this lease that the petitioner now applied to the Court to sanction.

Mr. B. C. Mitter for the petitioner. Under Mahomedan Law, this Court is vested with the powers exercised by the *Kazi* under the Mahomedan *rigime*, and can sanction dealings with *wakf* property. Before any alienation of *wakf* property can be made by a *mutwalli*, the sanction of the *Kazi* or, in other words, of a Judge of this Court is essential. See *Shama Churn Roy v. Abdul Kabeer* (1). A similar order was made by Stephen J. in *In the matter of a wakf-namah, dated May 30 h, 1896* (2).

WOODROFFE J. I will make an order in terms of the prayer of the petition, not under the Acts, which head the petition, but on the authority of *Shama Churn Roy v. Abdul Kabeer* (1), which lays down that this Court has jurisdiction under Mahomedan Law to authorise dealings with *wakf* property. A similar order was made by Mr. Justice Stephen on the 2nd July 1906.

The petition shows that the present rent is Rs. 90-8, less taxes, and this has to be recovered from a number of small tenants. It is now proposed to let the property at a rental of Rs. 130 to one tenant for 30 years. This appears to me to be beneficial. I make the order and give liberty to the applicant to carry out the arrangement.

Attorneys for the petitioner : *Alum and Mitter.*

J. C.

(1) (1898) 3 C. W. N. 158.

(2) (1906) Unreported.

APPELLATE CIVIL.

Before Mr. Justice Coxe and Mr. Justice Doss.

AYATUNNESSA BEEBEE

v.

KARAM ALI.*

1908

July 15.

Mahomedan law—Divorce—Marriage contract stipulating wife's option to divorce herself on husband marrying again, when to be exercised.

When a power is given to a wife by the marriage contract to divorce herself on her husband marrying again, if the husband does marry again, she is not bound to exercise her option at the very first moment she hears the news.

The injury done to her is a continuing one and she should have a continuing right to exercise the power.

The case is different when such a power is given to the wife after marriage.

Meer Ashruf Ali v. Meer Ashad Ali (1) and *Nuruddin v. Mussummat Chemuri* (2) followed. *Hamidoolla v. Faizunnissa* (3) applied.

APPEAL by defendant No. 1, Ayatunnessa Beebee.

Karam Ali Kagzi, the plaintiff, married the defendant No. 1, Ayatunnessa Beebee, on the 11th Sraban 1305. After they had lived together for 5 years without any issue, he married again, in order to obtain issue, at the wish of defendant No. 1, as it is alleged by the plaintiff and denied by the defendant No. 1. It was further alleged that defendant No. 1 had lived with the plaintiff for a year thereafter and was then taken away by defendants Nos. 3 and 4 in plaintiff's absence, in Asarh 1310, and that since then the defendants were not allowing her to come to the house of the plaintiff.

The defendant No. 1 admitted the marriage and pleaded *inter alia* divorce, which took place on the 27th Aughran 1311 in exercise of the power given to her by him before marriage.

The Subordinate Judge decreed the suit on the ground that Mahomedan law does not favour such rights and that the

* Appeal from Original Decree No. 392 of 1906, against the decree of J. C. Das, Subordinate Judge of Dacca, dated the 30th June 1906.

(1) (1871) 16 W. R. 260.

(2) (1905) 3 C. L. J. 49.

(3) (1882) I. L. R. 8 Calc. 327.

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option to divorce being delegated on the happening of a condition and no time being specified, within which the option should be exercised, it should have been done immediately on hearing that the condition had happened.

Mou'vi Serajul Is'am, for the appellant. Plaintiff cannot succeed, as he has broken a condition of the marriage contract, on which the defendant according to the contract has divorced herself. She had an option given to her, which did not become inoperative by reason of her not exercising it at once. *Hami-doola v. Faizunnissa* (1) and *Meer Ashruf Ali v. Meer A-had Ali* (2).

Dr. Priyanath Sen, for the respondent. According to Mahomedan law, such a conditional power must be exercised as soon as the condition is fulfilled. It cannot be kept in reserve, unless the power itself prescribes the time within which it may be exercised. See *Ameer Ali's Mahomedan Law*, Vol. II, 3rd ed., p. 431; *Baillie's Digest*, 2nd ed., p. 250; *Hedaya* by Grady, 2nd ed., p. 90 and *Wilson's Anglo-Mahomedan Law*, 2nd ed., p. 163. The case of *Meer Ashruf Ali v. Meer Ashad Ali* (2) is distinguishable, inasmuch as there the condition on which the option to repudiate was given to the wife, was 'the keeping of a concubine', and this was a wrong of a recurring character, so that the failure to repudiate on one occasion would not debar the exercise of the right to repudiate, when the occasion arises again. In the present case the wrong done to her could not be of a recurring nature, and she should have exercised her rights as soon as she came to know of the intention to remarry. Evidently she did not make up her mind then to exercise the right and waived it. She could not again exercise it. [Doss J. May not the passages in the text-books relate to post-nuptial delegation of power?] The Mahomedan Law makes no distinction between ante-nuptial and post-nuptial delegation of power, and by that law, delegated powers must be exercised as soon as possible and in the

(1) (1882) I. L. R. 8 Calc. 327.

(2) (1871) 16 W. R. 260.

strict form enjoined by that law. In *Hamidoolla v. Faizunnissa* (1) this question was not at all discussed, the main contention there being that the delegation of power to the wife was invalid except on certain specified occasions, and there the Court held that such delegation was not contrary to Mahomedan law.

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COXE AND DOSS JJ. This appeal arises out of a suit for the recovery of a wife.

The defence is that at the time of the marriage it was stipulated between the parties that in the event of the husband taking another wife the wife should have the power to divorce herself and that in the exercise of that power the defendant divorced herself in December 1904.

The Subordinate Judge has found that the stipulation was made and that the plaintiff broke it by marrying a second time. But he has held that the divorce is invalid, because the defendant did not exercise the option given to her immediately on hearing of the second marriage. The Subordinate Judge accordingly decreed the suit.

The wife appeals. The learned vakeel for the appellant relying on the decision in *Meer Ashruf Ali v. Meer Ashad Ali* (2) argues that the wife did not lose her option of declaring herself divorced by reason of the delay between the time, when she heard of the second marriage of her husband and the time, when she exercised her right. We cannot see that there is any real distinction between the case cited and the present one. If we follow that decision we are bound to hold that the defendant's divorce was valid and the suit must necessarily fail.

The learned pleader for the respondent has relied upon the authorities cited in the judgment of the learned Subordinate Judge and on certain passages in Wilson's *Anglo-Mahomedan Law*, second edition, page 163. But the passages, which have been read to us from these authorities, appear to deal only with cases in which the husband has, after marriage, given his wife the option of declaring herself divorced.

(1) (1882) I. L. R. 8 Calc. 327.

(2) (1871) 16 W. R. 260.

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In Wilson's Anglo-Mahomedan Law, page 168, it is stated—
 “It is a fact that nearly all of what is said on the subject in the Fatawa Alamgiri and the Hedaya has reference to permission given by the husband to the wife after marriage to divorce herself at her option in specified contingencies.” The cases referred to are therefore different from the case now before us in which the parties entered before marriage into this contract that the wife should have power to divorce herself under certain circumstances. This stipulation was a most important element in the marriage contract. That the above is a true distinction appears to be accepted in *Hamidoolla v. Faizunnissa* (1), in which the learned Judges say, “The Mahomedan law on the subject, which has been laid before us, provides for the delegation of the power of divorce by the husband to the wife on certain occasions by word of mouth, but it in no way, so far as it has been laid before us, limits the exercise of that power to those occasions * * * * * . We are aware of no reason, why an agreement entered into before marriage between parties able to contract, under which the wife consented to marry on condition that, under certain specified contingencies, all of a reasonable nature, her future husband should permit her to divorce herself under the form prescribed by Mahomedan law, should not be carried out.” We agree with this decision and think that we are not bound in dealing with a stipulation in a marriage contract, to be governed strictly by the rules laid down in the passages, which have been read to us, which deal with the exercise of the power of divorce by a wife, when an option is given by a husband after marriage. We think that, when a power is given to a wife by the marriage contract to divorce herself on her husband marrying again, then, if her husband does marry again, she is not bound to exercise her option at the very first moment she hears the news. The injury done to her is a continuing one and it is reasonable that she should have a continuing right to exercise the power. This was the view taken

(1) (1882) I. L. R. 8 Calc. 327.

by the Court in the case of *Meer Ashruf Ali v. Meer Ashad Ali* (1), which has already been cited. And that view was followed in *Nuruddin v. Mussummat Chenuri* (2), in which it is clear that the wife exercised the power of divorcing herself some time after the contingency, which gave rise to it, occurred.

On reading the evidence we do not think that the delay, which the wife made in this particular case, was under the circumstances unreasonable.

Accordingly we must hold that the divorce was valid and the suit should have been dismissed.

The appeal is accordingly allowed with costs in both the Courts.

Appeal allowed.

(1) (1871) 16 W. R. 260.

(2) (1905) 3 C. L. J. 49.

ORIGINAL CIVIL.

Before Mr. Justice Woodroffe.

1908

August 24.

GANODA SUNDARY CHAUDHURANI

v.

NALINI RANJAN RAHA.*

Trespass—Court of Wards, powers of—Mal-administration—Court of Wards Act (Bengal Act IX of 1879)—“Proprietor”—Infant beneficiary, residuary legatee when “proprietor”—Executrix, position of—Possession—Continuing trespass—Injunction—Civil Procedure Code (Act XIV of 1882) s. 424—Notice of suit, whether necessary, where Public Officers are sued in individual capacity, or injunction sought—Jurisdiction—Immoveable property—Acquisition by executrix—Trespass under order of higher official.

Thirteen years having elapsed since the death of the testator, and the administration by the executrix of his estate, which consisted of immoveable property in Eastern Bengal and Assam, not being complete, and there being a suggestion of mal-administration, the Court of Wards of Eastern Bengal and Assam declared the infant beneficiary a minor under the Act, declared its determination to take the estate under its charge as the property of the minor, and directed that possession be taken of the property on its behalf.

Subsequent to this declaration the executrix purchased a house in Calcutta for the estate and out of the assets of the estate.

The officers appointed by the Court of Wards proceeded to execute its directions, they collected and appropriated rents, the collection, however, being made in the name of the executrix as mutation of names had not been effected, and they took over the establishment of the executrix in the absence of the executrix, without her consent and in spite of her protest.

On a suit being instituted without notice under s. 424 of the Code of Civil Procedure by the executrix against the officers in their private individual capacity as trespassers, for a declaration of her title and for an injunction :—

Held, the Court of Wards can only take possession of the estate of a minor, if he can be said to be its “proprietor” within the meaning of the Court of Wards Act. The residuary legatee does not become “proprietor,” until after administration has been completed, and the residue ascertained and made over to him. The Court of Wards has no power under its Act to override the wishes of testators and proprietors generally. The Court of Wards has no power to determine whether there had been mal-administration by the executrix, and on its own determination to take possession of the property vested in the executrix. Mal-administration by the executrix was no ground for taking possession by the Court of Wards.

* Original Civil Suit No. 641 of 1908.

In the circumstances of the case, possession of the estate really remained with the plaintiff, and there was a continuing trespass against which the plaintiff was entitled to relief by way of injunction.

Section 424 of the Code of Civil Procedure has no application where public officers are sued not in an admitted official capacity, but as individual trespassers, nor so far as a suit seeks for relief by way of injunction.

The High Court may entertain an action in respect of immoveable property, provided a portion of such property is within the jurisdiction. It is not necessary that the cause of action should arise within the local limits, or be specifically with reference to the portion of the property, within those limits.

An acquisition of property for the estate by the executrix, by purchase out of the assets of the estate formed part thereof, although the purchase took place after the declaration of the Court of Wards taking over charge of the estate.

A trespass committed by order of a higher official is in substance the act of that official, who can be sued as a trespasser.

ORIGINAL SUIT.

THE plaintiff Sreemutty Ganoda Sundary Chaudhurani, the widow and executrix of one Mohun Chandra Roy Chaudhury, a zemindar of Atharbari in the District of Mymensingh, in the Province of Eastern Bengal and Assam, instituted this suit without notice against Nalini Ranjan Raha, J. R. Blackwood, and R. Nathan described in the plaint as gentlemen, praying *inter alia* (3) for a declaration that she was entitled as executrix to retain and be maintained in the peaceful possession and management of the estate of her deceased husband including a certain property in Calcutta, (4) for an injunction forthwith restraining the defendants, their servants and agents from interfering in any way whatsoever with the management and possession of the said estate by the plaintiff or otherwise intermeddling therewith, until the final determination of this suit, (5) for an injunction restraining the defendants from further proceeding with the application for substitution of names in place of the plaintiff in suit No. 38 of 1908 in the Court of the 3rd Munsif of Mymensingh or with any similar application for substitution that may have been made in any other Civil Court and from making any such applications, and also from further proceeding with the application for registration of names under Bengal Act VII of 1876, in the Collectorate of Mymensingh and also from making any similar

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application for registration in the Collectorate of Mymensingh or other district in respect of any revenue paying property belonging to the said estate, until the final determination of this suit, and (6) for an injunction perpetually restraining the defendants, their servants and agents from interfering in any way whatsoever with the management and possession of the said estate by the plaintiff or otherwise intermeddling therewith.

In January 1895, Mohun Chandra Roy Chaudhury died possessed of a considerable estate in the province of Eastern Bengal and Assam, and leaving a Bengali will, dated 2nd October 1890, whereby he appointed his widow, the plaintiff, his executrix.

The 8th clause of the will was as follows : " If any adult son of mine or a son of my loins or adopted son among my sons be living at the time of my death, the said adult son or the eldest among the sons shall be the executor. Failing him my wife Sreemutty Ganoda Sundari Chaudhurani shall be the executrix of this my will. . . . whoever other than the son of my loins or my adopted son shall be my executor or administrator, shall remain confirmed in the office, until the son of my loins or my adopted son attains majority. On the son attaining majority my property and the charge of performing the acts intended by me mentioned in the will shall devolve on him subject to the provisions of this will." On May 8th, 1895, the plaintiff obtained probate of this will from the District Court of Mymensingh, and took possession of the estate of the testator.

As early as 1884 the testator had by deed given the plaintiff power to adopt a son, and in May 1899 the plaintiff adopted Promode Charan Roy Chaudhury, an infant about two years old, as a son to her deceased husband.

It was alleged by the plaintiff that the testator died indebted to the extent of about seven lacs of rupees, and that she had reduced the debt by about two lacs by the date of suit, but that the administration of the suit was not yet complete.

By an order of the Board of Revenue of Eastern Bengal and Assam, dated 23rd April 1908, passed under the provisions of the Court of Wards Act of 1879, the Court of Wards declared Promode Charan Roy Chaudhury a minor under the Act, and declared its determination to take under its charge the property of the minor, and directed that possession be taken of such property on its behalf.

By a further order of the same Board, also dated April 23rd, 1908, the Court of Wards appointed the Commissioner of the Dacca Division and the Collector of Mymensingh to be respectively the "Managing Commissioner" and "Managing Collector" of the estate of the minor, and authorised the appointment of a Deputy Collector to be put in charge of the estate as "Manager." The defendants R. Nathan and J. R. Blackwood were at the date of the orders of April 23rd, 1908, respectively Commissioner of the Dacca Division, and Collector of Mymensingh, and in pursuance of the orders the defendant Nalini Ranjan Raha, a Deputy Collector, was on June 2nd, 1908, appointed Manager under the Court of Wards of the estate of the minor.

On June 3rd, 1908, there appeared in the *Eastern Bengal and Assam Gazette* a notification, dated May 27th, 1908, to the effect that the Court of Wards of Eastern Bengal and Assam had declared Promode Charan Roy Chaudhury a minor, and had assumed charge of his property, and requiring creditors to submit their claims to the Court of Wards at the office of the Board of Revenue at Dacca.

It was of this order, which was brought to her notice on June 4th, 1908, that the plaintiff complained. She alleged that since the death of the testator she had been and still was in possession of the estate of the testator, which included amongst other properties, No. 6, Bechoo Chatterjees Street, in Calcutta. This property was purchased by the executrix for the estate and out of the assets of the estate, but subsequent to the declaration of the Court of Wards. The plaintiff submitted that the estate left by the testator was legally vested in her as executrix, that she was recorded as such in the books

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of the Collectorate, and that by declaring Promode Charan Roy Chaudhury a Ward of Court, the Court of Wards had not acquired and could not acquire any jurisdiction or right to take over the estate or to affect her right to the estate or to interfere with her possession and management. She further alleged that, acting under the orders and directions of the other two defendants, the defendant Nalini Ranjan Raha on June 8th, 1908, wrongfully entered into her kutcherry at Atharbari and was at the date of suit trying to assume management of the estate and was attempting to interfere with the collection of rents of the estate by herself and her servants, that on July 2nd, 1908, he applied in the Court of the 3rd Munsif at Mymensingh to have the name of Promode Charan Roy Chaudhury as a Ward of Court through himself as next friend substituted in the place of her own name in a rent suit No. 38 of 1908, and that on July 7th, 1908, he applied before the Collector of Mymensingh for the registration of his name as manager under the Court of Wards in respect of several revenue paying properties belonging to the estate in the district of Mymensingh. The plaintiff charged that the three defendants acting in conspiracy and collusion wrongfully denied her right as executrix to the testator's estate and her right to the possession and management thereof, and were attempting to oust her from her office as such executrix, and threatening to obtain possession of the estate including the property in Calcutta, the tenant of which had been called upon to pay his rent to the defendant, Nalini Ranjan Raha.

The Deputy Collector alleged that, acting under the instructions of the "Managing Collector", on June 8th, 1908, he proceeded to Atharbari and took charge of all the documents of title, books of account and papers of the estate and that since that date he had been in actual possession of and carried on the management of the estate as manager under the Court of Wards.

The Deputy Collector collected and appropriated rents of the estate, the collection being made in the name of the executrix, as the mutation of names on the register had not been

effected, and took over the establishment of the executrix. This was done in her absence and without her consent and the executrix protested against the proceeding, and continued collecting rents herself on her own account.

The defendants denied the charges of conspiracy and collusion or that they had ever attempted or threatened to take possession of the property in Calcutta, or done any acts in reference thereto and alleged that the acts done by the "Managing Commissioner" and the "Managing Collector" in the appointment of the Deputy Collector as "Manager", and the taking possession of and assuming and retaining the management of the estate were lawfully done by them in pursuance of the orders of the Board of Revenue, in the discharge of their duty and in good faith, and that the acts done by the Deputy Collector, were similarly done in obedience to the lawful orders of his superior officers, which he was bound to execute. The defendants submitted that at the time of the orders of April 23rd, 1908, the estate was not vested in the plaintiff, that the plaintiff was only acting as manager for and on behalf of the minor, that the minor was the sole proprietor of the estate, and that under the orders of the Court of Wards the estate of the minor came into the lawful charge of the Court. It was admitted by the defendants that at the time of the declaration, the administration of the estate was not complete, but it was suggested, there had been unnecessary delay and mal-administration on the part of the executrix. On the institution of this suit, the plaintiff obtained a rule for an injunction, which came on for hearing on August 3rd, before Woodroffe J., and on August 4th, the further hearing of the rule was adjourned, until the hearing of the suit, which was expedited.

The Advocate-General (Mr. Sinha), (The Standing Counsel, Mr. W. Gregory, and Mr. Eggar with him) for the defendants. This suit has been instituted against public officers purporting to act in their official capacity and hence is not maintainable in the absence of notice under section 424 of the Code of Civil Procedure. The interpretation of section 424 cannot be

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deduced by reference to English cases on English statutes, where both the language and intention may be different. See *The Secretary of State for India in Council v. Rajlucki Debi* (1). The object of section 424 is to bring to the notice of an official that legal proceedings are threatened and to give him an opportunity to retrace his steps, or restrain his action. Hence section 424 would apply equally well to a rule for an injunction as to a suit. Further, before the plaintiff can obtain an injunction, she must shew that irreparable damage would be caused otherwise. Again this suit for an injunction is not maintainable, as the Court of Wards obtained actual possession of the estate on June 8th, 1908, before this suit was filed. The plaintiff's proper remedy, if any, would be under section 45 of the Specific Relief Act for relief in the nature of a mandamus. This Court has no jurisdiction to entertain this suit. The whole of the estate of the testator at the date of the declaration lay outside the jurisdiction. The Calcutta property was purchased recently after the declaration and hence did not vest in the plaintiff as executrix as part of the testator's estate. Moreover the Court of Wards of Eastern Bengal and Assam did not and could not under the Act take possession of the Calcutta property. The Court of Wards has power to determine for itself, whether there has been mal-administration of an estate, and on its own determination to take charge of an estate, before administration is complete. See section 5 of the Court of Wards Act. The executrix was not the "proprietor" of the estate within the meaning of the term in sections 6 and 7 of the Court of Wards Act. Though the estate may vest in an executor as such, the ownership is not in him. See section 4 of the Probate and Administration Act. By the term "proprietor" is meant the person beneficially entitled, in this case the infant. The testator's will, a Bengali will, should not be construed too strictly. See *Josephine Rose Harriss v. Edward Brown* (2). The plain and ordinary meaning of the clause in the will appointing the plaintiff executrix

(1) (1897) 1 L. R. 25 Calc. 239, 244.

(2) (1901) 5 C. W. N. 729.

was that the plaintiff should merely be the manager of the estate for the benefit of the minor, until he attained his majority. See *Taran Singh Hazari v. Ramratan Tewari* (1). *Dal Koer v. Punbas Koer* (2) was also referred to.

Mr. Chakravarti (*Mr. B. C. Mitter* and *Mr. D. N. Basu* with him) for the plaintiff. Section 424 of the Code of Civil Procedure has no application to this suit. The suit was instituted against the defendants in their private individual capacity as trespassers, and not in their official capacity. The acts of the defendants were not authorised by any statutory enactment. The defendants could not be said to be acting under the Court of Wards Act, in taking possession on behalf of the minor, of the estate, of which the plaintiff-executrix was "proprietor." See *Raleigh v. Goschen* (3), and *Bainbridge v. The Postmaster General* (4). Section 424 is intended to apply only to those cases, where the title or jurisdiction of the public officer is admitted, and the loss caused has been due to some irregularity, mistake or inadvertence on his part. Notice would be necessary to give the officer an opportunity to meet the claim without the annoyance of a suit. See *Shahbazadee Shahunshah Begum v. Fergusson* (5), and *Chunder Sikhur Bundopadhya v. Obhoy Churn Bagchi* (6). *The Secretary of State for India in Council v. Rajlucki Debi* (7), cited on behalf of the defendants was referred to, and not confirmed in *Manindra Chandra Nandi v. Secretary of State for India* (8). Again section 424 can have no application to a suit, where an injunction is sought. The section requires notice of suit to be given "in respect of an act purporting to be done." The relief sought by way of injunction here is against an act that is threatened and not complete. The possession of the estate remained in the plaintiff and the defendants were in the position of continuing trespassers. If in a suit for an injunction two months' notice were necessary, the mischief apprehended may be done before the suit could be filed. See *Flower v. Local*

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(1) (1903) I. L. R. 31 Calc. 89.

(2) (1904) 8 C. W. N. 658.

(3) [1898] 1 Ch. 73.

(4) [1906] 1 K. B. 178.

(5) (1881) I. L. R. 7 Calc. 499.

(6) (1880) I. L. R. 6 Calc. 8.

(7) (1897) I. L. R. 25 Calc. 239.

(8) (1907) I. L. R. 34 Calc. 257, 231.

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Board of Low Leyton (1). In *Hari v. Secretary of State for India* (2) it was held that notice of suit was necessary, on the express assumption that in the circumstances of that case no injunction could be claimed. See also *Manohar Ganesh Tambekar v. Dakor Municipality* (3), *Municipality of Parola v. Lakshmandas* (4), *Sardarsingji v. Ganpatsinghji* (5), *Dewakabai v. Mun. Com. of Bombay* (6).

This Court had jurisdiction over this matter. A portion of the estate, that is the Calcutta property, lay within its local jurisdiction. It is not necessary that the threats should have been made within the jurisdiction, or with reference to the portion within the jurisdiction, although we do allege that our possession of the Calcutta property was in fact threatened.

To give this Court jurisdiction, it would be enough if portions of an estate outside the jurisdiction were threatened, if a portion of the same estate lay within the jurisdiction of this Court. It was quite immaterial that the Calcutta property was purchased for the estate subsequent to the declaration. The assets, with which it was purchased, formed part of the estate; hence the property itself belonged to the estate. An acquisition by the executrix must form part of the estate.

The suggestion that the Court of Wards of Eastern Bengal and Assam had no power to take possession of property outside its jurisdiction is wrong. Sections 6, 7 and 11 of the Court of Wards Act show, that the jurisdiction is personal and in a proper case that Court would have such power. See *Lachmi Narain v. Fateh Bahadur Singh* (7).

The minor was not the "proprietor" of the estate within the meaning of the term in the Court of Wards Act. The beneficiary under a will cannot become "proprietor" until after administration is complete and the residue ascertained. See *Chatterput Singh v. Maharaj Bahadur* (8). The Court of Wards has no power to administer an estate and cannot obtain grant

(1) (1877) L. R. 5 Ch. D. 347.

(2) (1903) I. L. R. 27 Bom. 424, 450.

(3) (1896) I. L. R. 22 Bom. 289, 294.

(4) (1900) I. L. R. 25 Bom. 142, 150.

(5) (1889) I. L. R. 14 Bom. 395, 398.

(6) (1904) 6 Bom. L. R. 1028, 1030.

(7) (1902) I. L. R. 25 All. 195.

(8) (1904) I. L. R. 32 Cal. 198, 218.

of letters of administration. See *Ganjessur Koer v. The Collector of Patna* (1). The Court of Wards has no power to determine, whether there has been *devastavit*, and to take over charge of an estate on its own determination. In doing so the Court of Wards would be usurping the authority of a Civil Court.

The action of the Court of Wards was entirely highhanded and the plaintiff is entitled to an injunction. See *Colls v. Home and Colonial Stores, Limited* (2). If this Court is of opinion that the defendants did actually obtain possession of the estate, such possession was not legal possession and merely amounted to a continuing trespass; it would be unnecessary for the plaintiff to file a suit in ejectment and she was entitled to an injunction. See *Goodson v. Richardson* (3), which was followed in *Eardley v. Granville* (4) and *Allen v. Martin* (5). See also *Battersea Vestry v. County of London and Brush Provincial Electric Lighting Company, Limited* (6), and *Harrison v. Duke of Portland* (7). The plaintiff is entitled to relief against each one of the three defendants personally and individually. See *Raleigh v. Goschen* (8). *Hext v. Gill* (9) was also referred to.

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Cur. adv. vult.

WOODROFFE J. The plaintiff is the widow of Mohun Chandra Roy Chaudhury, zemindar of Atharbari, who was possessed of extensive zemindaries in Mymensingh. He died thirteen years ago in January 1895, leaving a will, of which he appointed the plaintiff executrix. The latter obtained probate on the 8th May 1895. Prior to his death he gave power to adopt and the plaintiff has adopted a son to him, Promode Charan Roy, now about 11 years old. The estate

(1) (1898) I. L. R. 25 Calc. 795.

(2) [1904] A. C. 179.

(3) (1874) L. R. 9 Ch. App. 221, 224, 226.

(4) (1876) L. R. 3 Ch. D. 826, 832.

(5) (1875) L. R. 20 Eq. 462, 467.

(6) [1899] 1 Ch. 474, 481.

(7) [1893] 1 Q. B. 142.

(8) [1898] 1 Ch. 73.

(9) (1872) L. R. 7 Ch. App. 699.

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was at the testator's death and now is in debt and certain directions of the testator have not yet been carried out. The plaintiff says that she in May 1908 came to learn that the Court of Wards of Eastern Bengal intended to take possession of the estate. On the 3rd June 1908 that Court issued a notification assuming charge of the estate in suit, which was described to be the property of the minor.

It is of this order that the plaintiff complains. She says that the estate is vested in her as executrix and it is not the property of the minor so as to enable it to be taken possession of under the Court of Wards Act. She seeks to avoid a threatened interference with her possession. The suit is not against the Court of Wards, but against those defendants, who are sued in their individual capacity. The first defendant is a Deputy Collector at present on deputation as Manager under the Court of Wards of the estate in suit. The second defendant is the Collector and District Magistrate of Mymensingh and is Managing Collector. The third defendant is the Commissioner of the Dacca Division and is Managing Commissioner. As I have said the suit is not against them in their official capacity, but in their private individual capacity as alleged trespassers. They are sued not because of, but in despite of the fact that they are public officers. The suit as originally framed proceeded on the assumption that the plaintiff was in possession. It asked for retention in and maintenance of possession and for an injunction restraining interference with such alleged possession. At the trial Counsel for the plaintiff asked to amend the plaint so as to ask for recovery of possession should the Court hold (which is not admitted) that the plaintiff was not in possession of the estate or some part of it. No notice of suit has been given. All the estate is without the jurisdiction with the exception of a small parcel, which is stated to belong to it and which was purchased for Rs. 10,000 out of funds belonging to the estate some short time ago, namely, a house in Calcutta, 6, Bechoo Chatterjee's Street.

The first objection taken is that the suit is bad, because no notice has been given and it is contended that notice is neces-

sary under section 424 of the Civil Procedure Code. It is argued, however, that section 424 has no application as the defendants are not sued in an admitted official capacity, but as individual trespassers. I think this contention is correct. But apart from this and assuming that the section was otherwise applicable, it would not, I think, apply, so as to render notice necessary so far as the suit seeks relief by injunction. The section doubtless says "in suit" but it also speaks of an act "done" and would not therefore apply to prohibit a suit for an injunction to restrain the commission of an act not done, but threatened to be done. And it has been so held. Were this not so a party would be deprived of relief: as the threatened act might and probably would take place before the expiry of the period of two months. I hold therefore that no notice is necessary. The second preliminary objection is that, even if notice is not necessary, the Court has no jurisdiction to entertain the suit. In my opinion it has. This is not a case in which jurisdiction is sought to be founded on the fact that a portion of the cause of action arose within the jurisdiction, in which case it might be necessary to prove that the threatened disturbance of possession took place within the local limits. Evidence has been tendered to meet the denial of the defendants that they are threatening to obtain possession of the Calcutta house and their allegation that the Court of Wards of Eastern Bengal have in fact no power to take charge of the house in this province except through the intervention of the Bengal Government; a matter, I may here interpose, of mere machinery. It is in fact charged that the allegation in the 13th paragraph of the plaint was made only with a view to give this Court jurisdiction to entertain the suit. The plaintiff has on the other hand sought to prove that the defendants have attempted to interfere with the plaintiff's possession of the Calcutta house.

It is said that the first defendant asked Kader Nath Ray, an employee of the Atharbari estate to write to ascertain the rent paid for the Calcutta house, and to demand payment of the rent. This is denied. A letter was then written by the Naib

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Krishna Das Chaudhury to the tenant of the Calcutta house. This man was formerly in the service of the estate and was with other servants continued by the Court of Wards. This letter purports to be written on behalf of the Court of Wards and claims payment of rent. This was followed by a letter from the tenant to the plaintiff, in which he writes that he owes rents, but that as he has received a letter directing him to pay to the Court of Wards manager, he says :—"I cannot decide whether I should send rent to the said Babu."

I have not heard the plaintiff's Counsel's argument as to this part of the case and I express no opinion on it so far as it consists of the evidence of the plaintiff's witnesses, as in my opinion a finding on it is immaterial, the Court possessing jurisdiction for the reasons to be stated. I may however in passing point out that apart from this evidence Exhibit I constitutes a threat against the Calcutta property, which the first defendant appears to have been desirous of dealing with, as also the second defendant, the direction of the latter to *wait* having, I think, been given in order that mutation of names might be first effected.

It is well settled that this Court may entertain an action in respect of immoveable property provided that a portion of such property is within the jurisdiction. This no doubt is contested on the ground that, though there is a house in Calcutta, it was purchased after the Court of Wards' declaration and does not, it is said, belong to the estate. This contention however is in my opinion not well founded. The assets, with which it was purchased, formed part of the estate and that, into which the assets were converted, whether before or after the declaration, equally belong to the estate. An acquisition by the executrix for the estate is part of it. And this is so as regards the defendants none the less that as between the executrix and the ultimate beneficiary, the latter might for one reason or other challenge or refuse to adopt the conversion effected. This being so a portion of the estate is in Calcutta. The suit seeks first a declaration and as portion of the estate, in respect of which that declaration is sought, is within the local

limits, this Court can grant a declaration as regards the whole estate. And for the same reason it may grant an injunction. A distinct threat has been made and attempted to be given effect to in respect of the estate without the jurisdiction, that is against an estate, a portion of which is within the local limits. It is not necessary, as I have said, that that threat should either have been made or attempted to be given effect to within the local limits or specifically with reference to property within those limits. I hold therefore that this Court has jurisdiction to entertain the suit. But then it is said that relief should be by ejectment it being contended that the Court of Wards have already taken possession, the amendment, which I allowed, being the subject of objection. Undoubtedly there has been a disturbance of possession. Some rents and other monies have been collected and appropriated and the plaintiff's establishment directed to obey the order of the defendant appointed manager. But these rents have been collected in the name of the plaintiff and necessarily so, until mutation of names has been effected, which has not yet been done. The money orders cashed were in the plaintiff's name and the establishment was taken over in the plaintiff's absence and without her consent. Indeed she protested at once and has since made certain collections on her own behalf. Since the rule all collections on either side have stopped. There has been, therefore, in my opinion no such possession as would disentitle the plaintiff to an injunction and necessitate resort to an action of ejectment. I am of opinion that possession has really remained with the plaintiff, though there has been a continuing trespass, against which she is entitled to relief by way of injunction. I now come to the merits and as regards these the plaintiff has in my opinion a very clear case. The Court of Wards can only take possession of the estate, if the plaintiff's minor adopted son can be said to be its "proprietor" within the meaning of the Court of Wards Act. That term is not defined and it is therefore necessary to ascertain its meaning in this connection. It is contended for the defendants that the executrix is not the

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proprietor. But this is not the proper form of the question, which rather is—is the minor the proprietor? If he is not, the Court of Wards have clearly no right to take it from the plaintiff, in whom as executrix it is vested in law. It is contended further that the position created for the plaintiff by the will is that merely of a manager for the infant proprietor. But however this may be we must look at the grant of probate. Under that grant the plaintiff is the representative of the testator and the estate vests in her as such. But then it is said that, even assuming this to be so, “proprietor” in the Act does not mean a person representatively entitled, but the beneficiary, and that, as the minor is the ultimate beneficiary, the property is his notwithstanding that the estate has admittedly not yet been administered. I cannot however accept this contention. If it were sound the Court of Wards would be entitled to override the wishes of testators and proprietors generally. A person may desire and direct that his estate should vest in and be managed by an executor. The Court of Wards can, it is suggested, at any time override this direction and notwithstanding the grant of probate take the estate out of his hands (notwithstanding moreover that as Court of Wards it has no power of administration); or a trust might be created *inter vivos* for the benefit of an infant and the Court of Wards might according to the argument, come in with or without any pretext and dispossess the trustee. It can never have been intended that the Court of Wards Act was to have power to override private rights in this way. And the language of the Act does not warrant this construction. The residuary legatee does not become “proprietor,” until after the administration has been completed and his interest thus ascertained. This interest is subject to the payment of debts and legacies and the discharge of other trusts contained in the will. No doubt he is beneficially interested in the estate subject to these payments and the discharge of these trusts, but he is not proprietor, except when a residue has been ascertained, which on completion of administration is made over to him by the executrix. It is

admitted that the estate is unadministered. But it is said that the testator died thirteen years ago and there has been mal-administration. If this be so it may be ground for an action for administration on behalf of the minor, but it is no ground for taking possession by the Court of Wards. The argument even goes the length of asserting that the Court of Wards may determine, whether there has been mal-administration and on its own determination take possession of property vested in the executrix. No authority has been cited or any of these propositions, which appear to be clearly unsustainable. In my opinion the minor is not the proprietor of the estate so as to enable the Court of Wards to take possession of it. The plaintiff is then entitled to a declaration in terms of clause 3 of the prayer of the plaint and to the injunction sought in clauses 4—6 of the same. The plaintiff is entitled to relief against all the defendants. The documents and evidence show that the defendant Mr. Nathan directed the defendant Mr. Blackwood to assume charge of the Atharbari estate and that the latter by an order directed the first defendant to carry this out, which he has attempted to do. It is not necessary that all the defendants should actually commit the trespass and a trespass committed by order of a higher official is in substance the act of that official, who can be sued as a trespasser.

The rule is therefore made absolute with costs and the suit is decreed in the terms stated as against all the defendants with costs.

Attorneys for the plaintiff : *B. N. Bose & Co.*

Attorney for the defendants : *H. C. Eggar.*

Suit decreed.

Injunction granted.

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RANJAN
RAHA.
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J.

CRIMINAL REVISION.

Before Mr. Justice Brett and Mr. Justice Ryves.

1908
July, 31.

AHMED ALI

v.

KEENOO KHAN.*

Revision—High Court, revisional jurisdiction over immovable property—Power to interfere with orders directing restoration of possession of immovable property—Duty of Magistrate to pass orders under ss. 517 and 522 in favour of a party forcibly dispossessed—Criminal Procedure Code (Act V of 1898), ss. 423 (1) (d), 439, 517 and 522.

Under section 423 (1) (d) of the Criminal Procedure Code the High Court has power, as a Court of Revision, to interfere with an order passed by a Magistrate under section 522 of the Code.

Manki v. Bhagvanti (1), followed. *Ravi Chandra Mistry v. Nobin Mirdha* (2), referred to.

Where a party was found to have been assaulted and dispossessed of a bungalow and its contents by the opposite party, who was, in consequence, convicted under section 323 of the Penal Code:—

Held, that it was the duty of the Magistrate to have passed orders under sections 522 and 517 directing restoration of the bungalow and its contents to the party thus forcibly dispossessed.

CRIMINAL RULE.

The petitioner was a 5 annas co-sharer of mouzah Gurial, their interest in which the other co-sharers had sold or leased to one Reazut Hossein and others, the masters of the present accused. It was alleged that in August 1907, Reazut Hossein wanted the petitioner to lease his share also to him, but the former refused. On the 9th September following the accused, Keenoo Khan and others, went to the petitioner's village and entered his tiled bungalow, beat him and forcibly ousted him therefrom.

The accused were put on their trial before Babu D. L. Roy, a Deputy Magistrate of Gya, who examined the prosecution witnesses and framed a charge under section 147 of the Penal

* Criminal Revision No. 804 of 1908, against the orders of Nagendra Nath Gupta, Deputy Magistrate of Gya, dated 4th May and 6th June 1908.

(1) (1904) I. L. R. 27 All. 415.

(2) (1898) I. L. R. 25 Cal. 630.

Code. He was then transferred and the case was continued before Babu Nagendra Nath Gupta who, on the 16th April 1908, convicted three of the accused under section 323 of the Penal Code. He found that the complainant was in possession of the tiled bungalow at the time of the offence and had been ejected by the accused.

On the same date the accused Keenoo applied to the Magistrate for restoration of the articles found in the bungalow as well as possession of the latter.

On the 4th May the Magistrate passed the following order :—

I find that no decision was arrived at as to whom the moveable property within the tiled bungalow found by the police belonged. As regards the tiled bungalow, I found that the complainant was dispossessed from the tiled bungalow. Some of the accused were convicted under section 323 of the Penal Code. It was not decided that force was used to drive out the complainant from the bungalow. The force might have been used either to check the high-handedness of the complainant for not allowing other tenants to transplant their fields, or to dispossess the complainant from the bungalow. Unless there is a specific charge that force was used to drive the complainant from the bungalow, I have no power to order the complainant to be put in possession of the property. I order the property to be returned to the party, in whose possession they were found."

On the 6th June the accused again applied to the Magistrate for delivery of possession of the bungalow, and he passed an order in the following terms :—

The bungalow may be made over to the person, in whose possession it was found by the police. As the accused Keenoo Khan was in possession of it, it is to be made over to him.

The petitioner then moved the High Court against the two orders and obtained the present Rule.

Mr. Mahmudul Huq (*Mr. Sultan Ahmed* and *Mahomed Mustafa Khan* with him) showed cause. Under section 520 of the Code a Court of appeal or revision may interfere with orders passed by a Magistrate under section 517, 518 or 519, but no such power is given with reference to orders under section 522. Section 423 (1) (d) only applies, when the main case has been revised and a consequential or incidental order becomes necessary. Here the main order is that of the Magis-

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trate sentencing the accused, but the Rule is with respect only to the order under section 522.

Mr. Remfry (with him *Babu Atulya Charan Bose*), for the petitioner. There is nothing in the argument of the opposite side.

[BRETT, J :—Have we not an inherent jurisdiction? See *Ram Chandra Mistry v. Nobin Mirdha* (1). RYVES, J :—See *Manki v. Bhagwanti* (2)] These cases are in my favour.

BRETT AND RYVES JJ. After hearing the learned Counsel on both sides we are of opinion, that the Rule must be made absolute and the orders passed by the Deputy Magistrate, on the 4th May and 6th June 1908, directing delivery of the bungalow and its contents to the opposite party, must be set aside and in lieu thereof an order passed that the bungalow and its contents be made over to the petitioner.

It is clear from the facts stated in the petition that the petitioner's case, in which he charged the opposite party with having forcibly dispossessed him of the bungalow and its contents, was found to be true, and the opposite party was convicted under section 323 of the Indian Penal Code of having forcibly dispossessed him of both. In those circumstances it was the duty of the Magistrate to pass orders under sections 522 and 517 of the Criminal Procedure Code directing restoration to the petitioner of the bungalow and its contents, from which it was found he had been forcibly dispossessed.

It has, however, been contended on behalf of the opposite party that this Court has no power to interfere in revision with an order passed by a Magistrate under section 522 of the Code of Criminal Procedure. It is admitted that such a power is expressly given with reference to an order under section 517, but it is argued that such a power is not expressly given with reference to an order passed under section 522 of the Criminal Procedure Code, and this Court cannot interfere with an order under the latter section. We find, however, that this question was before the Allahabad High Court in the case of *Manki v. Bhagwanti* (2), and the learned Judges distinctly held that

(1) (1898) I. L. R. 25 Calc. 630.

(2) (1904) I. L. R. 27 All. 415.

under the provisions of clause (d) of section 423 of the Criminal Procedure Code, this Court, as a Court of Revision, has full power to interfere with an order under section 522 of the Criminal Procedure Code. The learned Judges in that case referred to the case in this Court of *Ram Chandra Mistry v. Nobin Mirdha* (1), as apparently laying down a different view. The question was not, however, before this Court in that case, and the remarks made by the learned Judges of this Court in their judgment, in which they deal with the argument advanced on the basis of the principles laid down by the Privy Council in *Rodger v. Comptoir D'Escompte de Paris* (2) that it is the duty of all Courts to take care that the act of the Court does no injury to any of the suitors, seem to indicate that, if a fit case for their interference had been made out, they would not have hesitated to enforce the principle. We agree with the view taken by the Judges of the Allahabad High Court, and hold that the objection taken cannot be sustained, and that this Court has power to interfere in revision with an order passed by a Magistrate under section 522 of the Criminal Procedure Code.

We, therefore, make the Rule absolute, set aside the orders of the Deputy Magistrate, dated the 4th May and 6th June, and in lieu thereof direct that the bungalow and its contents be made over to the petitioner.

Rule absolute.

(1) (1898) 1. L. R. 25 Calc. 630. (2) (1871) L. R. 3 P. C. 465, 475.

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CRIMINAL REVISION.

Before Mr. Justice Brett and Mr. Justice Ryves.

PHANINDRA NATH MITRA

v.

EMPEROR.*

1908
July, 14.

Commitment—Right of the accused to cross-examine the prosecution witnesses, and to produce defence evidence before commitment—Power of Magistrate to commit at any stage of the case—Jurisdiction of the High Court, as a Court of Revision, to quash a commitment made to it in its Original Criminal Jurisdiction—Criminal Procedure Code (Act V of 1895), ss. 208, 215 and 347.

Section 347 of the Criminal Procedure Code cannot be read as subject to s. 208, so as to render it imperative on a Magistrate, after he has decided to commit the case to the Sessions, to allow the accused to cross-examine the prosecution witnesses and to call witnesses in his defence.

Where, therefore, the accused did not cross-examine the prosecution witnesses immediately after their examination-in-chief, but applied to the Magistrate, after the close of the prosecution, to cross-examine them and to examine defence witnesses :—

Held, that the Magistrate was justified under s. 347 in committing the case without the cross-examination of the prosecution witnesses and the examination of the witnesses for the defence.

In re Clive Durant (1), followed. *Queen-Empress v. Ahmad* (2), *Emperor v. Muhammad Hadi* (3), dissented from. *Queen-Empress v. Sagal Samba Sajao* (4), distinguished.

Quære :—Whether the High Court, in its Appellate and Revisional Jurisdiction, has power to quash a commitment made to the Court in its Original Criminal Jurisdiction.

CRIMINAL RULE.

The petitioner, who was the printer and publisher of a vernacular newspaper called the “*Jagantar*,” was placed before the Chief Presidency Magistrate charged under s. 124A of the Penal Code in respect of certain seditious articles published in the

* Criminal Revision No. 788 of 1908, against the order of T. Thornhill, Esq., Chief Presidency Magistrate of Calcutta, dated the 23rd of June 1908.

(1) (1898) Ratanlal's Unrep. Cr. Ca. p. 975. (3) (1903) I. L. R. 20 All. 177.

(2) (1898) I. L. R. 20 All. 264.

(4) (1893) I. L. R. 21 Calc. 642.

above paper in its issue of the 9th May 1908. It appeared that the petitioner, who was unrepresented, did not cross-examine the prosecution witnesses immediately after their examination-in-chief, but on the 23rd June, when the prosecution had closed its case, a pleader appeared on his behalf and made an application to the Magistrate to be allowed to cross-examine the prosecution witnesses and to call witnesses for the defence.

The Magistrate refused the application and committed the accused to the High Court on the same day.

The third Sessions of the High Court, to which the petitioner stood committed, commenced on the 1st July, and the application to quash the commitment was made on the 8th instant, but before his case was taken up.

Mr. C. R. Dass (*Mr. S. N. Haldar* and *Babu Narendra Kumar Bose* with him), for the petitioners. As to the jurisdiction of this Court, the word "High Court" in s. 215 means, according to the definition in s. 4 (j), the highest Court of Criminal Appeal or Revision. In Chapter XXIII, no doubt "High Court" means the Court in its Ordinary Original Criminal Jurisdiction. Section 208 is imperative, and s. 347 is to be read subject to it. An accused has the right of cross-examining the prosecution witnesses before commitment: *Queen-Empress v. Sagal Samba Sajao* (1). The Magistrate has no power to commit, until he has taken all such evidence as the accused may produce before him: *Queen-Empress v. Ahmad* (2), followed in *Emperor v. Muhammad Hadi* (3).

The Standing Counsel (*Mr. W. Gregory*), instructed by *Mr. Hume*, for the Crown. Section 347 of the Code is not controlled by s. 206. Its terms are imperative. If it appears to the Magistrate at any stage of the proceedings that the case ought to be tried by the High Court, he shall stop further proceedings and commit. Under s. 208 the accused has the right to cross-examine a prosecution witness immediately after his examination-in-chief, but he has no right of cross-examination

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(1) (1893) I. L. R. 21 Calc. 642. (2) (1898) I. L. R. 20 All. 264.

(3) (1903) I. L. R. 26 All. 177.

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at the end of the prosecution case, when the Magistrate has made up his mind that the case must be committed. Refers to *In re Clive Durant* (1).

BRETT AND RYVES JJ. The present application is made to us under s. 215 of the Criminal Procedure Code praying that we will quash the commitment made by the Chief Presidency Magistrate to the High Court of the petitioner, Phanindra Nath Mitra, on a charge under section 124A of the Indian Penal Code. The grounds, on which we are asked to quash the commitment are, that the Presidency Magistrate refused to allow the petitioner to cross-examine the witnesses examined for the prosecution or to cite and examine witnesses in his defence, it being contended that the provisions of s. 208 of the Criminal Procedure Code are imperative, and that the Magistrate was in law bound to allow the petitioner these privileges. It seems that, while the witnesses for the prosecution were being cited and examined, no attempt was made by the accused to cross-examine them, and that the application to cross-examine those witnesses and to cite witnesses for the defence was made to the Presidency Magistrate after the prosecution had closed its case, and the Magistrate had decided to commit the petitioner for trial to the High Court.

The present application is, so far as we are aware, the first of its kind, which has been made to this Court in the exercise of its Ordinary Appellate Jurisdiction, and it seems doubtful to one of us whether, in the exercise of that jurisdiction, we have power to quash a commitment made to this Court for trial under its Ordinary Original Criminal Jurisdiction. The practice in somewhat similar cases has been to apply to the Judge exercising the Original Criminal Jurisdiction of the Court. The question of jurisdiction is one of considerable importance, but as the present application is urgent, we do not propose to deal with it, as we hold that the application must fail on the merits.

The question, which is raised by the application, is whether s. 347 of the Criminal Procedure Code is to be read as subject

to the provisions of s. 208 of the Criminal Procedure Code, so as to render it imperative on a Magistrate, after he has decided to commit an accused for trial to the High Court, to allow him to cross-examine the witnesses for the prosecution and to call witnesses in his defence. In our opinion the question must be answered in the negative, and in this view we are supported by a decision of the Judges of the Bombay High Court in the case of *In re Clive Durant* (1). Section 347 distinctly lays down that, when a Magistrate has made up his mind to commit an accused for trial, "he shall stop further proceedings." The section occurs in Chapter XXIV, which lays down the general provisions as to enquiries and trials, and its provisions cannot be held to be governed by the provisions in Chapter XVIII of the Code, which lay down the procedure to be ordinarily followed up to the time when the Magistrate decides to commit.

The attention of the learned Judges of the Allahabad Court, who decided the cases of *Queen-Empress v. Ahmad* (2) and *Emperor v. Muhammad Hadi* (3), to which we have been referred, does not appear to have been invited to the provisions of s. 347 of the Criminal Procedure Code and the case of *Queen-Empress v. Sagal Samba Sajao* (4) is clearly distinguishable from the present, as in that case the point determined was that the depositions of witnesses, whom the accused had not been allowed to cross-examine before the committing Magistrate, were not admissible in evidence in the Sessions Court.

We decline, therefore, to interfere and dismiss the application.

Rule discharged.

E. H. M.

(1) (1898) Ratanlal's Unrep. Cr. Ca. p. 975. (3) (1903) I. L. R. 26 All. 177.

(2) (1898) I. L. R. 20 All. 264.

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ORIGINAL CIVIL.

Before Mr. Justice Woodroffe.

1908
June 22.

KRISTA CHANDRA GHOSE

v.

KRISTA SAKHA GHOSE.*

*Receiver—Lease—Summary jurisdiction—Remedy—Interest—Receiver's
accounts—Practice.*

Where a lease had been already granted by a Receiver acting under an order of Court, and possession of the property had been given to the lessee, and subsequently certain parties applied to the Court for a declaration that the lease was invalid, and for certain other reliefs against the Receiver and the lessee.

Held, that no summary order could be passed to set aside the lease. The proper remedy would be by suit against the Receiver, and also against the lessee, if it was alleged that the lease was obtained by collusion.

Surendro Keshub Roy v. Doorga Soondery Dossee (1), distinguished.

Held further, that on this application no order could be made against the lessee for interest on arrears of rent, nor could any order be passed against the Receiver in respect of the same, as this was a matter touching the Receiver's accounts.

ORIGINAL SUIT.

This was an application by certain of the present parties to an old equity suit for a declaration that the lease of a certain zemindari granted by the Receiver was invalid and for certain other incidental reliefs against the Receiver and the lessee.

The material facts were shortly as follows :—

On August 19th, 1823, Raja Raj Krista died, leaving a will, whereby he appointed Krista Chandra Ghose and Krista Sakha Ghose amongst others his executors. On May 22nd, 1834, this suit was instituted in the old Supreme Court by Krista Chandra Ghose against the defendant executor, the other executors and the heirs of the Raja for the administration and partition of his estate, for the appointment of a Receiver and other incidental relief.

* Ordinary Original Civil Jurisdiction.

(1) (1888) I. L. R. 15 Cal. 253.

By an order dated the 16th September 1836, the Receiver of the Supreme Court was appointed Receiver of the estate, and by a decree passed on the 10th April 1838, the respective shares of the heirs were declared, and a commission of partition was directed to issue.

A large portion of Raja Raj Krista's estate, however, including the zemindari *Gangamandal*, continued to remain unpartitioned, in the hands of the Receiver of the Supreme Court, and on the establishment of the present High Court, in the hands of the Receiver of the latter Court. This suit was, from time to time, revived in the names of the representatives of the parties, who happened to die or relinquish their interest, and the present applicants were brought on the record in the place of their predecessors in title by an order, dated the 12th November 1902.

On the 5th March 1902, an order was passed giving the Receiver liberty "from time to time, without further order of the Court, to lease the said estate, for a term not exceeding six years, on such terms as to such Receiver may seem reasonable."

Under the last mentioned order the Receiver granted a lease of the zemindari of *Gangamandal* to Raja Benoy Krista, one of the parties to the suit, at a yearly rental of Rs. 64,500 for a term of six years expiring on the 11th April 1908. In November 1907 the petitioners offered to take from the Receiver a lease of the zemindari, on the expiry of the current lease, at an enhanced rent. On the 7th January 1908, that is, before the termination of the current lease, the Receiver, without notice to the other parties to this suit, granted a lease of *Gangamandal*, for a further term of 6 years as from the 11th April 1908, at the same yearly rental of Rs. 64,500 to the same lessee. On the 11th February 1908, the petitioners made an offer to the Receiver to take a lease of the Zemindari for 6 years at an increase of Rs. 10,000 over the present yearly rent, and on the 6th March 1908, the Receiver informed the petitioners that he was not in a position to accept their offer. On now discovering for the first time the lease granted on the 7th January 1908, the petitioners made the present application, further charging the Receiver with having failed

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to enforce the terms of the previous lease against Raja Benoy Krista, in not realizing from him the interest payable by him on arrears of rent.

This application, which was on notice to the parties, was for a two-fold order :—

(i) That the lease of the 8th January 1908 granted by the Receiver to Raja Benoy Krista be held to be invalid as against the applicants and that a lease of *Gangamanda* be granted after due advertisement so as to secure a larger rental in the interests of the estate ; and

(ii) That the Receiver be directed to realise all sums due for interest from the said lessee Raja Benoy Krista or he do personally make good the losses sustained by the estate in that behalf.

The first part of the application was heard on June 8th, 1908.

Mr. A. Chaudhuri for the petitioners, and *Mr. Chakravarti* for some of the parties, in support of the petition, applied for an adjournment to file further affidavits.

The Advocate-General (Mr. Sinha) (Mr. Stokes with him) for the lessee, Rajah Benoy Krista, took the preliminary objection that the application could not be entertained. The lease was executed on January 8th and possession was taken. The matter had passed out of the stage of a contract and had resulted in a conveyance of the property to the lessee. The Court had no power to pass any summary order on this application, declaring the lease invalid. The petitioners' remedy lay in instituting a separate suit.

Mr. Chakravarti. Parties are always allowed to appear *pro interesse suo*. The lessee was a party to this suit, and all the parties were before the Court. The Court can always control the management of an estate by the Receiver. See *Surendro Keshub Roy v. Doorga Soondary Doss* (1). The jurisdiction extends beyond the region of contract.

Mr. A. Chaudhuri. The act complained of was an act of the Receiver. The lessee being a party to the suit, could

always be brought before the Court : See Woodroffe on Receivers, pp. 220, 221.

Mr. C. R. Das, for some of the parties, supported the Advocate-General and cited *Ghosal v. Ghosal* (1) decided by Sale J. in favour of his contention.

The Advocate-General, in reply. Both the cases *Surendro Keshub Roy v. Doorga Soondary Dossee* (2) and *Carne v. Branker* (3) cited therein, dealt with matters of contract, and are to be distinguished from the present application, where the lessee has rights *in rem*. Similarly with the case of *De Winton v. The Mayor of Brecon* (4), where the Receiver parted with money without the sanction of the Court. In the present matter the Receiver had the Court's sanction, and the only question is, whether he exercised his discretion properly.

Mr. B. C. Mitter appeared for the Receiver, and *Mr. H. D. Bose*, and *Mr. Rasul* for other parties.

WOODROFFE J. The Advocate-General appears on behalf of the lessee Rajah Benoy Krista Deb, to whom the Receiver has leased the property, the subject of this application, and takes a preliminary objection that this application cannot be entertained and that the lease having been already executed, no summary order can be passed such as is asked for here. On the other hand, reliance is placed upon cases, in which the parties were allowed to appear *pro interesse suo*; but these cases do not apply, because there the question arose on the application of third parties aggrieved by the Court's action through its Receiver, and the Court grants such an application by reason of the control it necessarily has over its Receiver's action. This is not a case of that kind. I am not asked in this matter to control the action of the Receiver, because the Receiver has already done that which is complained of and has conveyed the property into the hands of the lessee, a third party, to whom the Receiver, under the order giving him authority to do so, granted a lease, which has been completed and under which possession has been given.

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(1) Unreported.

(2) (1888) I. L. R. 15 Calc. 253.

(3) (1869) 17 W. R. 342, 837.

(4) (1860) 20 Beav. 200.

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J.

Admittedly, in this case, the lessee is also a party to the suit ; but though he is subject to the jurisdiction of the Court as a party, he is not subject to its jurisdiction as lessee. This is not a case in which the matter rests on an agreement, which has not been carried out, and in which the Court may interfere to prevent its Receiver giving effect to the proposed agreement. This is a case, in which the matter has passed out of the stage of agreement, and has resulted in a conveyance of the property to the lessee. As long as that lease stands, the property must be taken to be in the lessee, and I do not think that I can, on this application, set aside that lease.

The course open to the applicant appears to me to be by proceeding by suit against the Receiver, and also, if it is alleged that the lease was granted and obtained by collusion, against the lessee. In the case cited, *Surendro Keshub Roy v. Durgasoodery Dossee* (1) the Court was asked to control the action of the Receiver and to enforce the applicant's right to have a lease, for which a contract had been entered into ; and in the English cases therein cited, the matter still rested on contract and an order was made directing enquiry as to damages against the lessee, who had repudiated the contract, and in the other case, the Receiver had parted with money without the authority of the Court and so the Court's money was ordered to be paid back. But here, unless the lease is set aside, the interest is not that of the Court, or of the parties, but of the lessee.

Under these circumstances, the application appears to me to be not entertainable and must be dismissed.

I need only add had the preliminary point not prevailed, I should have been disposed to grant the adjournment asked for by Mr. Chaudhuri and by Mr. Chakravarti in order to put in further affidavits.

Application dismissed.

THE second part of the application was heard on June 22nd, 1908.

(1) (1888) I. L. R. 15 Calc. 253.

WOODROFFE J. This is a part of an application, which I dealt with on the 8th June 1908. On that date, I dealt with the question then raised, as to whether the lease granted by the Receiver to Raja Benoy Krista Deb Bahadur should not be set aside, which I then decided in the negative. Another part of the application asks that the Receiver may be directed to realise all sums due for interest from the lessee or he d personally make good the losses sustained by the estate. As regards this application, a distinction must be drawn between the present and the late lease. As regards the present lease, it is clear, if the parties insist on it or any of them, that the terms of the lease must be strictly enforced, and, if the rent is in arrears, the lessee must pay interest; but on the other hand, the lessee is not bound to pay anything under the lease before it is due. Then the question arises, as to the late lease, whether an order can be made as to the interest on the arrears of rent, which it is said amounts to a large sum of money, nearly Rs. 9,000, and which should, it is said, have been recovered by the Receiver from the lessee. There appears to me to be two objections to this part of the application. No order can be made against the lessee on the present application. If it can, it is said, the lessee holds a discharge from the Receiver for all the rent under the late lease. However that may be, it is sufficient to say, no order can be made against the Rajah on this application. Then, if the applicant has any remedy against the Receiver in respect of these moneys, the matter cannot be gone into on this application. It is a matter touching the Receiver's accounts. In so far as the Receiver's accounts have been passed, the matter may be taken to be concluded. So far as the accounts have not been passed, it is open to the parties to raise the question on the passing of the accounts. The answer of the Receiver as to the payment of interest on arrears of rent not being insisted on is given in the 4th paragraph of his affidavit sworn on the 11th June 1908, in which he states that the parties agreed to waive interest on arrears of rent, because the lessees agreed to pay a monthly allowance of Rs. 3,000 in advance and Rs. 3,000 before the closing of the Court offices for the *pujahs*

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and this agreement was in consideration of the interest in respect of each instalment of rent not being insisted upon. As I have said, I desire to express no opinion on the merits of these contentions, because, in so far as they are against the lessee, they cannot be gone into in these proceedings ; and as against the Receiver, they must be raised (if at all) on the passing of the Receiver's accounts and the Court can then determine, whether the matter can then be gone into or whether it is one, as to which the parties must file a suit against the Receiver. I express no opinion on the merits. The result is the application is dismissed with costs.

Application dismissed.

Attorney for the petitioner : *C. C. Bose.*

Attorneys for Raja Benoy Krista Deb : *Morgan & Co.*

Attorneys for other parties : *S. K. Deb, Leslie & Hinds, Watkins & Co., B. N. Bose & Co., C. C. Mitter, A. N. Ghose.*

J. C.

ORIGINAL CIVIL.

Before Mr. Justice Stephen.

EBRAHIM ISMAIL TIMOL

PROVAS CHANDER MITTER.*

1908
Aug. 5

*Jurisdiction—Suit for land—Suit by lessee for rents and profits during absence
—Lessor in possession—Letters Patent, 1865, cl. 12.*

A, a lessee of certain premises outside the jurisdiction of the Court, having vacated the premises on account of being sentenced to a term of imprisonment, on his release brought a suit against the lessor, who had in the meantime taken over possession, claiming the rents and profits arising therefrom pending the termination of the lease, and further claiming that the lessor during his absence became trustee for him.

At the hearing the lessor contended there was no cause of action as this was a suit for land.

Held, that, inasmuch as the lessee was seeking to obtain possession of the premises by claiming the rents and profits from the lessor, he sought to do something, which directly affected the property, and therefore this was a suit for land outside the jurisdiction of the Court and must be dismissed.

Delhi and London Bank v. Wordie (1), *Kellie v. Fraser*, (2) and *Hara Lal Bannerjee v. Nitambini Debi*, (3) followed. *Rungo Lal Lohea v. John Wilson* (4) distinguished.

ORIGINAL SUIT.

THIS was a suit brought by the plaintiff, Ebrahim Ismail Timol, for an account to be taken by the High Court of certain sums of money due to him by the defendant, Provas Chandra Mitter, under a lease, and for damages resulting from the wrongful removal of certain stables; and further that the lease and the rights of the plaintiff as lessee be declared valid and subsisting, and that the plaintiff be entitled to receive the rents and profits of the premises pending the termination of the lease, or that in the alternative the defendant do pay

* Original Civil Suit No. 462 of 1908.

(1) (1876) I. L. R. 1 Calc. 249.

(3) (1901) I. L. R. 29 Calc. 315.

(2) (1877) I. L. R. 2 Calc. 445.

(4) (1898) I. L. R. 26 Calc. 204;

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to the plaintiff the sum of Rs. 1,500 with interest at 4 per cent. per annum.

The facts were shortly as follows :—

By an Indenture of lease, dated the 2nd November 1905, and made in Calcutta between the defendant as lessor and the plaintiff as lessee in consideration of a monthly rent of Rs. 220, the defendant demised and leased to the plaintiff a dwelling house and premises No. 38, Elgin Road, in the town of Calcutta for a term of 15 years from the 15th September 1905 until the 30th September 1920, subject to certain covenants contained in the lease, of which one provided, that the plaintiff should deposit with the defendant the sum of Rs. 1,500 to carry interest at 4 per cent. per annum as security for the due payment of the rent reserved. Thereafter the plaintiff paid to the defendant the sum of Rs. 1,500 by way of security and took possession of the premises about the 15th September 1905. He paid the defendant the rent reserved by the lease until the month of May 1906, having previous to that date erected upon the premises certain tiled stables at a cost of Rs. 3,500. The plaintiff in his plaint stated that on the 12th August 1906 he received from the defendant a letter demanding payment of the rent due for the said premises for the month of July 1906, and as he was himself unable to attend to business he immediately handed the letter to his uncle, D. L. Barmanic, and instructed him to look after the matter, but he found on entering the premises on the 16th August 1906, that the defendant had leased it to a third party at a rental of Rs. 400, and had removed the stables erected by the plaintiff and sold the materials used in erecting the stables.

The plaintiff also pleaded leave to institute his suit under clause 12 of the Charter.

The defendant in his written statement denied that the plaintiff paid rent up to May 1906, and alleged that he only paid rent up to March of that year long after it became due.

Thereafter, being unable to realize rent from the plaintiff, the defendant brought a suit in the Small Cause Court of Sealdah in July 1906 for the recovery of rent due for April,

May and June 1906, and obtained a decree on the first of August 1906. The plaintiff after institution of the Small Cause Court suit paid up Rs. 220 and the defendant has given him credit for that amount. The defendant then took out execution against the plaintiff and found the premises abandoned by the plaintiff and all furniture removed. At about this time the defendant heard that the plaintiff was convicted of criminal breach of trust and sentenced to a long term of imprisonment, and he also found that the water pipes had disappeared from the premises, and that the electric fittings had been damaged. After taking possession of the premises the defendant found that the plaintiff had erected tiled huts on the tennis Court without his consent, and contrary to the terms of the lease. The huts were of small value, and the defendant submitted that they became his property absolutely under the provisions of the Transfer of Property Act.

The defendant denied the statement that he relet the premises Rs. 400, but alleged that he gave a fresh lease of the premises to a Mr. Goodwin for a term of 3 years and 5 months at a monthly rent of Rs. 265. Subsequently the defendant removed the tiled huts and sold them for Rs. 70, the best available price at the time. The defendant submitted that, inasmuch as the plaintiff allowed the rent to fall in arrear over 21 days, the lease thereby terminated and was no longer subsisting. The defendant further submitted that on the alternative claim of Rs. 1,500 with interest, the following was a summary of what was due to him by the plaintiff.

a. Amount due on interest at 6 per cent.—
 e month of July, 1906,
 g damages sustained by
 g vacant during August
 e sum which the defen-
 uses on account of the
 nises. c. The sum of
 o pay for brokerage,
 plaintiff.

entitled to a set off of
 Rs. 2,597-15 against the

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sum of Rs. 1,500 with interest at 4 per cent. and submitted that there should be a decree in his favour for the difference.

Mr. Pugh and Mr. Stokes for the plaintiff. This is not a suit for land, but for money only. *Runga Lall Lohea v. John Wilson* (1), *Kellie v. Fraser* (2), *Delhi and London Bank v. Wordie* (3), *Hara Lal Bannerjee v. Nitambini Debi* (4), referred to. I shall be satisfied with a personal order against the defendant. The mere fact that the suit is about land is not the test, the real question being, is it a suit for dispossession of land? *Land Mortgage Bank v. Sudurudeen Ahmed* (5). The defendant never received the money for rent at the house of the plaintiff, but always in Calcutta. The only case against me is *Hara Lal Bannerjee v. Nitambini Debi* (4), where Harington J. held that a suit for administration was a suit for land.

The Advocate-General (Hon'ble Mr. S. P. Sinha) (with him, *Mr. Chakravarty and Mr. S. R. Dass*) for the defendant. I admit that a suit for rent is not a suit for land, but this is not a suit for land. The prayer in the plaint shows that he is seeking to obtain such title as he can have to the land. The suit is not merely for a declaration, but is a suit to obtain control and possession of the house itself. The plaintiff under his plaint claims that, inasmuch as the defendant took over possession of the house, he is a trustee for the plaintiff, and that he is to receive the rents and profits for the plaintiff. He does not claim the surplus rents and profits, but claims to be entitled to the rents and profits. *Runga Lall Lohea v. John Wilson* (1) distinguished. See Foa's Landlord and Tenant, page 397. This case is similar to *Delhi and London Bank v. Wordie* (3). The words in clause 12 of the Charter mean the same thing as section 16 (a) (b) (c) (d) (e) and (f) of the Code. *Nalum Lakshimikantham v. Krishnasawmy Mudaliar* (6) referred to. Section 16 of the Code shows what really is a suit for land. *Kellie v.*

(1) (1898) I. L. R. 26 Calc. 204;

2 C. W. N. 718.

(2) (1877) I. L. R. 2 Calc. 445.

(3) (1876) I. L. R. 1 Calc. 249.

(4) (1901) I. L. R. 29 Calc. 315.

(5) (1892) I. L. R. 19 Calc. 358, 360.

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(6) (1903) I. L. R. 27 Mad. 157.

Fraser (2). The nature of the suit is really to recover possession and comes clearly within clause 12 of the Charter.

STEPHEN J. In this case the plaintiff claims certain reliefs under the following circumstances :—

On the 2nd of November 1905 he took from the defendant a lease of a house and premises 38, Elgin Road, which are admittedly beyond the limits of the local Original Jurisdiction of this Court. The lease was for 15 years from the 15th of September 1905. It contained two provisions with which we are concerned ; the first was an ordinary covenant for re-entry by the landlord in case of non-payment of rent, the other provision gave him a right to enter on the premises on their being vacated by the tenant, and enabled him in that case to relet the premises, the tenant remaining liable on his covenants, and in particular being liable for any deficiency of the rent on re-letting by the landlord. What occurred was that the rent for the months of April, May and June fell into arrears, and the landlord obtained a decree in respect of these arrears in the Small Cause Court in August of that year. At about the same time the premises were vacated by the defendant on his being committed to jail in consequence of a conviction before the criminal sessions of this Court. The plaintiff's chief contention is that the defendant entered on the premises under the second of the covenants that I have mentioned, and that the lease has not been terminated, but the defendant is a trustee for his benefit in respect of the profits that he has received in respect of these premises and must account to him for any rent he has obtained from the premises exceeding the amount which the plaintiff has undertaken to pay. He also claims damages for stables, which he says the defendant has pulled down, and alternatively, if the lease is terminated, a return of Rs. 1,500, which he deposited with the defendant as security for rent.

On these facts the defendant has taken a preliminary objection that this is a suit for land or immoveable property outside the local limits of the jurisdiction of this Court, and can-

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not therefore be tried by this Court under the powers conferred by clause 12 of the Letters Patent. To decide this question I must in the first place look to the prayers of the plaint to see what exactly are the reliefs claimed. Of these I need consider only the first four. By the first and second the plaintiff asks for an account of money due to him under the lease, by the third for a declaration that the lease and the rights of the lessee are valid and subsisting, and by the fourth for a declaration that he is entitled to the rents and profits of the premises pending the termination of the lease.

The subject matter of the first and second of these is money in the hands of the defendant as trustee for the plaintiff and is based on events that have occurred. The subject matter of the third and fourth must apparently be the premises in question and the rents and profits arising therefrom. The granting of the third and fourth prayers will enable the plaintiff to recover rents from any tenant of the house, and will thus put the plaintiff into possession of the house by receipt of its rent. The law applicable to the case may be gathered from several decisions in this Court. In the first place a comparison may usefully be made between the two cases of the *Delhi and London Bank v. Wordie* (1) and *Kellie v. Fraser* (2). The first of these was a suit to have certain trusts carried into effect, and its express purpose is stated by Garth C. J. to be to compel the sale of certain land not within the local jurisdiction of the Court. It was held that the case depended on whether the suit was "brought substantially for land, that is for the purpose of acquiring title to, or control over, land" within the meaning of clause 12: and on the facts it was decided that it was and that the Court had no jurisdiction.

The second case, which is one of two chiefly relied on by the plaintiff, was an application to file an award, by which a dissolution of a partnership was awarded, and it was ordered that a tea garden at Darjeeling, the property of the partners, should be sold. It was held a suit to effect what was ordered by the award could not have been a suit for land, because

(1) (1876) L. L. R. 1 Calc. 249.

(2) (1877) L. L. R. 2 Calc. 445.

the object of the suit would have been to enforce a dissolution of the partnership on suitable terms and not to obtain possession of or acquire a title to the tea garden ; and that the application was therefore within the jurisdiction of the Court. The case of *Rungo Lall Lohea v. Wilson* (1) is also relied on by the plaintiff. There the suit was for rent of premises in Howrah. The defendant did not deny that they were tenants of the premises, and were liable to pay rent for them. What was disputed was the terms of the tenancy and the right of the plaintiffs in respect of it. No relief was asked for in respect of the land, and it was not sought to deal with it in any way. It was accordingly held that this was not a suit for land under clause 12. In *Hara Lall Bannerjee v. Nitambini Debi* (2) the plaintiff sued for construction of a Will, for administration of the property demised, and for the immediate possession of immoveable property at Hooghly. Following the decisions in *Delhi and London Bank v. Wordie* (3) and *Kellie v. Fraser* (4), it was held that the suit was for land. The facts of this case seem to me to show that as far at least as the third and fourth prayers are concerned the suit is one for land. This appears to me certainly so in view of the case of the *Delhi and London Bank v. Wordie* (3), and I see no reason at all for not following that ruling in consequence of anything that is found in the decision in *Kellie v. Fraser* (4). Indeed the difference between these two cases seems to me to show that this is certainly a suit for land. I was at first struck with the case of *Rungo Lall Lohea v. Wilson* (5), but on looking into the facts of that case I think that it is abundantly clear that it is entirely different from the present one. What the plaintiff is seeking to do is to do something, which will directly affect the property, namely, to obtain possession of it by receipt of rent. Under these circumstances I hold that this is a suit for land outside the jurisdiction of this Court and consequently that it cannot be brought as far as prayers 3 and 4 are concerned.

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It then remains to be considered whether I can entertain the prayer for an account by the defendant, and the prayer for damages in respect of the pulling down of the stables referred to by the plaintiff. It seems to me clear that I cannot entertain either of these two prayers. The plaintiff alleges that his lease is still in existence and neither of the questions that I have referred to can be determined till this point is decided.

The plaintiff alleges that the defendant is for some purposes his trustee. This again depends entirely upon what has taken place under the lease. The result is that this suit must be dismissed with costs. I have to add that the defendant at an early stage of the case made an offer that, if the plaintiff would admit that the lease was terminated, the question of the defendant's liability to account for Rs. 1,500, which he has received, should be decided.

This offer was not accepted by the plaintiff.

Attorney for the plaintiff : *Fox and Mandal.*

Attorney for the defendant : *Manuel and Agarwalla.*

R. G. M.

CRIMINAL REVISION.

Before Mr. Justice Brett and Mr. Justice Ryves.

FANINDRA NATH CHATTERJEE

v.

EMPEROR.*

1908
July 31.

Summary trial—Jurisdiction—Facts determining jurisdiction to try summarily—Criminal Procedure Code (Act V of 1898) s. 260—Distrain, legality of—Form of the distress warrant—Bengal Municipal Act (Bengal Act III of 1884), s. 122.

It is not the complaint alone, which determines the jurisdiction of the Magistrate to try a case summarily, but the complaint and the subsequent examination of the complainant taken together.

Where it appeared from the complaint and the sworn examination of the complainant that the facts amounted to an offence under s. 186 of the Penal Code :—

Held, that the Magistrate had jurisdiction to try the case summarily.

Bishu Shaik v. Saber Mollah (1) referred to.

Where the distress warrant authorized the distraint of the moveables of the defaulters, wherever found within the Municipality, or any other moveables found within the holding specified, it was *held* that the tax daroga was justified in attaching goods proved to belong to the defaulters, which were found within the municipal limits.

CRIMINAL REFERENCE.

ON the 25th March 1905 a complaint was lodged by one Binda Charan, tax-daroga of the Durbhunga Municipality, before the Deputy Magistrate in charge at Durbhanga, "that on the day previous he had gone to realize municipal taxes due from one Haridasi and Baroda Kanta Chatterjee, who had a shop under the fictitious name of *Minto Brothers* within the jurisdiction of the Durbhunga Municipality ; that he ordered a peon to attach ten tins of red powder from the shop in the presence of one Fanindra Nath Chatterjee, but the latter ordered his servant to obstruct the attachment and not to allow the properties to be removed from the shop, and further

* Criminal Reference No. 145 of 1908, by H. E. Ransom, Sessions Judge of Durbhunga dated the 26th July 1908

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criminally intimidated him and his men, and that Fanindra and his servant having showed force, he sent for the head-constable to help him in making the distraint, but that both the accused resisted his legal action."

The complainant applied for summonses under s. 186 and s. 504 of the Penal Code.

He was examined on oath and stated as follows :—

"I went with a warrant yesterday to realize the municipal tax from Haridasi and Baroda, who have recently opened a shop under the name of *Minto Brothers*. I went to the shop. My peon attached ten tins of red powder. A boy, named Fanindra, ordered his peon to take away the attached tins, and the latter then seized them from my peon. I sent for the head-constable to help me as provided by law. In his presence also the boy intimidated me, and said he would not allow the attached property to be taken away."

The Magistrate issued warrants under ss. 186 and 504 of the Penal Code, but tried the case summarily, and convicted the accused under section 186, and sentenced them to fines.

In his subsequent examination during the trial the complainant omitted all reference to the criminal intimidation, and only alleged that the property attached had been re-taken from his peon at the order of the petitioner, Fanindra, who angrily refused to allow it to be distrained.

The distress warrant purported to be against the firm of *Haridasi Baroda Kant Chatterjee* and was in the terms set forth in the judgment of the High Court.

Upon motion to the Sessions Judge of Durbhunga by the accused, he referred the case, under s. 438 of the Criminal Procedure Code, to the High Court, recommending the reversal of the convictions and sentences.

The material portions of the Letter of Reference were as follows :—

I do not think the Deputy Magistrate's order can be sustained. In addition to his (complainant's) statement in the petition of complaint that he had been criminally intimidated, the tax-daroga in his examination by the Deputy Magistrate also said he had been intimidated, which must, I think, be taken to mean criminally intimidated by the petitioners. At the subsequent trial no doubt he omitted all reference to any such offence and merely spoke of the distraint having been angrily resisted. The jurisdiction of the Court would appear however to be determined, as a matter of principle, by the petition of complaint, unless possibly there may be anything in the examination of a complainant to show that the offence stated in the petition was not committed.

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The ruling in *Bishu Shaik v. Saber Mollah* (1) is an authority in support of this view. I lay stress upon this, as in a very recent reference, *Emperor v. Ram Narain Jha*, where the examination of the complainant had not been properly recorded and where I did not quote this ruling, a Divisional Bench of the Hon'ble Court followed the complainant's sworn statement as determining the jurisdiction, in preference to the petition of complaint itself, which recited an offence, which was not triable summarily. A municipal tax-daroga is a public servant, and the offence complained of fell properly under section 189 of the Indian Penal Code, which is not triable summarily. It appears to me that the Deputy Magistrate acted without jurisdiction in holding a summary trial. There is also in my opinion another serious defect in the proceedings. The tax-daroga professed to act under a warrant issued under section 122 of the Bengal Municipal Act (III of 1884). This warrant authorised him to distrain the moveable property of *Haridasi Baroda Kant Chatterjee*. In his evidence at the trial, he states that this was the name of a shop, which he was informed was owned by the petitioners and others, that the shop was closed, and that he proceeded to another shop opened in the name of *Minto Brothers*, which he was informed was owned by the owners of the shop of *Haridasi Baroda Kant Chatterjee*, and that there he attached ten tins of red powder which the first petitioner caused to be forcibly taken away by the second petitioner. It appears to me that in levying the distraint in the shop of *Minto Brothers*, the daroga exceeded his authority under the warrant. It appears to me immaterial whether, as the Magistrate finds (though this finding is based on no evidence but the mere hearsay statement of the daroga) the owners of the two shops are the same person. The warrant authorised the attachment of the property of *Haridasi Baroda Kant Chatterjee* relating to a particular holding, 11771, and could not, therefore, be executed upon goods forming the ostensible property of other owners. If, therefore, the offence fell merely under section 186 of the Indian Penal Code the petitioners would appear to be justified in resisting the attachment as the daroga was not acting in the discharge of his public functions. The actual resistance complained of cannot, I think, under such circumstances, be regarded as an excess of the petitioner's right of private defence. I recommend that the Magistrate's order be set aside, and the fines, if paid, be refunded.

Ba'bu Dwarka Nath Mitra in support of the reference. The complaint determines the procedure to be adopted, viz., whether it is to be regular or summary. See *Bishu Shaik v. Saber Mollah* (1) and *Ram Chunder Chatterjee v. Kanye Laha* (2). I generally adopt the reasoning of the learned Sessions Judge in his Letter of Reference.

Mr. Orr (Deputy Legal Remembrancer) for the Crown. The whole of the evidence in this case shows that the offence committed was one under s. 186 of the Penal Code, and the

(1) (1902) I. L. R. 29 Calc. 409.

(2) (1876) 25 W. R. Cr. 19.

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Magistrate had, therefore, jurisdiction to try the case summarily. The ruling in *Bishu Shaik v. Saber Mollah* (1) is distinguishable. The facts of that case were quite different. The distress warrant justified the tax-daroga in seizing any moveable property of the defaulters within the limits of the Municipality, and the Magistrate found that the property attached belonged to the defaulters and were within such limits.

BRETT AND RYVES JJ. This is a reference by the learned Sessions Judge of Durbhunga forwarding the case of Fanindra Nath Chatterjee and Chandoo Khan, who were convicted by a Deputy Magistrate under section 186 of the Indian Penal Code and sentenced to pay a fine of Rs. 50 and Rs. 20 respectively, with a recommendation that the convictions and sentences should be set aside.

Two grounds have been suggested for the interference of this Court. First, that the Magistrate had no jurisdiction to try the case summarily, inasmuch as the complaint filed by the complainant discloses an offence punishable under section 189 of the Indian Penal Code, which is not triable summarily, and secondly, that the warrant of distraint made over to the complainant authorised him to distrain the properties of the defaulters named therein found in certain premises described in the warrant. It has been found that the goods, which had been placed in the premises named in the warrant, had a short time previously been removed to another shop, which was fictitiously opened under the style of *Minto Brothers*, but which was really in the same ownership as the old shop.

It is contended that the tax-daroga under this warrant had no right to seize the properties in the shop owned by the *Minto Brothers*.

On the first point the learned Sessions Judge relies on the case of *Bishu Shaik v. Saber Mollah* (1) as an authority for showing that the jurisdiction of a Magistrate to try a case summarily depends on the wording of the complaint. That case, however, does not lay down any such proposition. It

(1) (1902) I. L. R. 29 Calc. 409.

was there held that "on the facts before the Magistrate the offences complained of were not triable summarily. The petition of complaint discloses the commission of a much more serious offence than the offence for which the Magistrate has held a summary trial. The examination of the complainant, which has not been properly recorded, does not show that the offence so complained of was not committed." It is clear in this case both from the complaint and from the sworn statement of the complainant that the facts stated do not amount to anything more than an offence, which is covered by section 186 of the Indian Penal Code. We, therefore, think that the Deputy Magistrate had jurisdiction to try the case summarily.

On the second point also we are unable to agree with the learned Sessions Judge. The form of the warrant authorised the tax-daroga "to distrain the moveable properties of the said defaulters, wherever they may be found within the Municipality, or any other moveable properties, which may be found within the holding specified in the margin to the amount of the said sum." Once it is established by evidence that the goods, which were sought to be distrained, belonged in fact to the defaulters and were within the limits of the Municipality, the tax-daroga had complete jurisdiction to distrain them under this warrant for the amount specified therein.

For these reasons we decline to interfere, and direct the records to be sent down.

E. H. M.

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Before Mr. Justice Brett and Mr. Justice Ryves.

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August 11.

KANCHAN GORHI

v.

RAM KISHUN MUNDUL.*

Complaint—Magistrate—Complaint to Magistrate in charge of the sadar—Reference of complaint to another Magistrate for inquiry and report—Jurisdiction of latter to direct prosecution of the complainant before dismissal of the complaint—"Judicial proceedings"—Criminal Procedure Code (Act V of 1908) ss. 4 (m) and 476.

Where a complaint was lodged before the Senior Deputy Magistrate in charge of the *sadar*, who referred it to a Junior Deputy Magistrate "for inquiry and report", and the latter, after taking evidence, drew up a proceeding under s. 476 against the complainant, and submitted a report to the former Magistrate, upon which he dismissed the complaint the next day :—

Held, that the proceeding before the Junior Deputy Magistrate was a "judicial proceeding" within s. 4(m), and that he had jurisdiction under s. 476 of the Criminal Procedure Code to direct the prosecution of the complainant for an offence under s. 211 of the Penal Code committed before him.

CRIMINAL RULE.

ON the 1st June 1908 the petitioner lodged a complaint before Babu S. K. Mukerjee, the Deputy Magistrate in charge of the *sadar* Purnea, against one Ram Krishna Mundul and others, alleging that they went to his house on the 28th May 1908 and extorted Rs. 50 from him. It appeared from the order-sheet of Babu S. K. Mukerjee that on the 17th June he referred the case to Mr. E. A. Oakley, a Deputy Magistrate, "for inquiry and report," and the latter in his Explanation to the High Court admitted that the case had been sent to him for that purpose.

On the 2nd July Mr. Oakley examined the petitioner and some of his witnesses, and having disbelieved the prosecution story, drew up a proceeding on the 9th instant, under s. 476 of the Criminal Procedure Code, against the petitioner, and

* Criminal Revision No. 845 of 1908 against the order of F. S. Hamilton, Sessions Judge of Purnea, dated the 15th July 1908.

put him on bail to appear, when called upon. On the same day he drew up a report and forwarded it to Babu S. K. Mukerjee with the order under s. 476. On receipt of the report the latter, on the next day, dismissed the complaint under s. 203 of the Code in the absence of the petitioner and without recording any reasons for his order as required by the section.

The petitioner thereafter moved the Sessions Judge of Purnea, who refused to interfere. He then obtained the present Rule from the High Court on the ground that after the Deputy Magistrate, Babu S. K. Mukerjee, had transferred the case to Mr. Oakley for "inquiry and report" only, and the latter did not take up the case for trial, but merely for the purpose of making a report, he had no jurisdiction to pass an order under s. 476 of the Code, until the case was legally disposed of by Babu S. K. Mukerjee.

Mr. Orr (Deputy Legal Remembrancer), for the Crown. The order of transfer to Mr. Oakley was not illegal. The senior Deputy Magistrate had power under s. 192 of the Code to refer the case to Mr. Oakley. The proceeding before the latter was a "judicial proceeding" under s. 4 (m), as he had the power to examine, and did examine, witnesses on oath. Then under s. 476 he had jurisdiction to direct the prosecution of the complainant as the offence under s. 211 of the Penal Code was committed before him.

Babu Dasarathi Sanial (Babu Aban Bhusan Mukerjee with the petitioner. The case of the accused was sent to him by obvious error under s. 202 of the Code "for inquiry only." An investigation under this section is not a proceeding." Again Mr. Oakley had no jurisdiction under s. 476 as the case was forwarded to him only for inquiry and report and not for trial. Further he had no power to direct the prosecution of the petitioner, until the case had been dismissed by the senior Deputy Magistrate. *Endra Nath Mookerjee v Emperor* (1) and *Queen v Sham Lal* (2).

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BRETT AND RYVES JJ. It appears that the case, out of which this Rule arises, was sent by Babu S. K. Mukerjee, who had taken cognisance of it, to another Deputy Magistrate, Mr. Oakley, for inquiry prior to the issue of processes against the accused. Mr. Oakley made the inquiry, examined witnesses, and came to the conclusion that the case, as presented by the complainant, was false and, therefore, he took proceedings under section 476 of the Criminal Procedure Code, and committed the complainant for trial under section 211 of the Indian Penal Code.

The present Rule was obtained on the District Magistrate to show cause why the proceedings drawn by Mr. Oakley under section 476 of the Criminal Procedure Code should not be set aside on the ground that, after the case had been transferred to Mr. Oakley by the Deputy Magistrate, Babu S. K. Mukerjee, for inquiry and report only. Mr. Oakley had no jurisdiction to pass an order under section 476 of the Criminal Procedure Code, until the original complaint was disposed of.

Whether the case was sent to Mr. Oakley by Babu S. K. Mukerjee under the provisions of section 192 or under section 202 of the Criminal Procedure Code, it is clear that Mr. Oakley, in carrying out the order received with that order of transfer examined witnesses and recorded evidence on oath. In our opinion the proceedings conducted by Mr. Oakley, who is a Magistrate, fall within the description given in section 4, clause (m) of the Criminal Procedure Code of "judicial proceedings." That being so we must hold that, under the provisions of section 476 of the Criminal Procedure Code, Mr. Oakley had power to take proceedings under that section against the complainant for any offence referred to in section 195 of the Criminal Procedure Code committed before him or brought to his notice in the course of those proceedings, and to commit the accused for trial for having committed that offence.

We must, therefore, discharge the Rule.

Rule discharged.

ORIGINAL CIVIL.

Before Mr. Justice Chitty.

POORENDRA NATH SEN

v.

HEMANGINI DASIS*

1908

July 1, 2, 6.

Hindu Law—Will, construction of—Direction as to management of property—Gifts—Express gift, or no words of gift—Partition—Widow's right to share on partition.

An express gift by will of property by a testator to his sons will defeat the right of a widow to a share on partition.

Debendra Coomar Roy Chowdhry v. Brojendra Coomar Roy Chowdhry (1) referred to.

Where however a will contains no words of gift to the sons, but merely operates to postpone a partition of the property to a particular date with directions as to management in the meantime, the property vests in the widow as executrix for that purpose, and the sons take the property as on an intestacy and not by any bequest.

Kishori Mohun Ghose v. Moni Mohun Ghose (2), *Sorolah Dossee v. Bhoobun Mohun Neoghy* (3) referred to.

Where a widow is entitled to a share on partition, her right is not affected by the fact that she had already inherited a share from one of her sons.

Jugomohan Haldar v. Sarodamoyee Dossee (4) referred to.

The share, which a widow takes as heiress of her son, is not *stridhan* property.

Jodoonath Dey Sircar v. Brojonath Dey Sircar (5) referred to.

ORIGINAL SUIT.

THIS was a suit brought by the plaintiffs Poorendra Nath Sen and Basudeb Sen for the construction of the will of their deceased father, Baikunta Nath Sen, under the following circumstances.

Baikunta Nath Sen, a Hindu landholder of Calcutta governed by the Bengal School of Hindu Law, died on 16th April 1895, leaving a will, which he had made and published in the Bengali language in the year 1895. By his will he appointed his wife Srimati Hemangini Dasi, the 1st defendant, his sole executrix and, except for certain Government securities,

* Original Civil Suit No. 135 of 1908.

(1) (1880) I. L. R. 17 Calc. 886.

(3) (1888) I. L. R. 15 Calc. 292.

(2) (1885) I. L. R. 12 Calc. 165.

(4) (1877) I. L. R. 3 Calc. 149.

(5) (1874) 12 B. L. R. 385.

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he bequeathed the whole of his property to his six sons, but postponed the partition of his properties by the executrix, until his youngest son attained the age of 21 years.

The provisions of the will were as follows :—

1. I make the last will revoking all previous dispositions made by me. On my demise, my immoveable and moveable properties shall be disposed of and all acts in respect thereof done according to the purport thereof.

2. I appoint Srimati Hemangini Dasi, my wife, inhabitant of No. 20, Darpanarain Tagore's Street, Calcutta, as executrix of my will. On my demise my entire estate shall come into her hands and under her management.

3. The said executrix shall collect my dues of all descriptions and pay off debts, if there be any.

4. With reference to the state (income) of my estate, the said executrix shall meet requisite expenditures for performing the marriages and social rites and observances relating to (my) four unmarried sons, and for looking after and making management of the estate and for education and for preservation of health.

5. The said executrix shall be competent to purchase Government securities with the surplus of my estate. The said papers shall merge in the estate.

6. My sons possess no right to the Government securities, which I, having purchased or endorsed in the name of my wife Srimati Hemangini Dasi, have given to her.

7. On my youngest son Sriman Jagatpati Sen attaining the age of 21 years the said executrix shall divide my estate among and give it to my sons in equal shares.

8. If the said executrix die before making division of the estate in the manner specified above she shall, before her death, appoint to her office my third son Sriman Nirad Sen, otherwise called Sriman Nirendra Nath Sen, that is, he shall be the executor of my estate.

The testator, Baikunta Nath Sen, left him surviving three married daughters by a predeceased wife, the 1st defendant Srimati Hemangini Dasi his sole widow, and by her three

unmarried daughters, and six sons, *viz* :—The plaintiffs, Poorendra Nath Sen and Basudeb Sen, and the 3rd to 6th defendants Nirendra Nath Sen, Jaganath Sen, Jagadish Sen and Jagatpati Sen, the last three being then infants, but all of whom have since attained their majority, the youngest having attained the age of 21 years on the 1st August 1906.

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On the 7th June 1895 the 1st defendant Srimati Hemangini Dasi applied and obtained probate of the will of the testator and took possession of all the property. Thereafter disputes arose between the parties regarding their rights and interests in the estate, and a suit was instituted in 1895 by the two eldest sons of the testator. On the 27th March 1896 judgment was delivered in the above mentioned suit, whereby the will was partially construed, and it was held that the plaintiffs had no right to immediate partition, as the youngest son had not attained the age of 21 years. The suit was accordingly dismissed. The sons, having all reached the age of 21 years, the plaintiffs called upon the executrix to make over their shares, but in spite of repeated demands she neglected and failed to do so on the ground that she was entitled to have a further share in the estate equal to that of one of her sons. The plaintiffs thereupon brought the present suit for construction of the will, and for partition, and for an order that the executrix be directed to render an account, and further that a Receiver be appointed to take charge of the estate and make over to the plaintiffs their share of the rents, issues, and profits, or that she be restrained by injunction from intermeddling with the estate.

On the 17th April 1907, after the institution of the suit, the 6th defendant, Jagatpati Sen, died.

The 1st defendant, Srimati Hemangini Dasi, in her written statement, submitted that upon the partition of the testator's estate she was entitled to a share equal to that of each of the testator's sons, and that no case had been made out for the appointment of a Receiver or for an injunction.

The 2nd, 3rd, 4th, and 5th defendants in their written statement denied taking part in the management of the estate

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except in so far as the 2nd defendant, Jaganath Sen, had carried out the instructions of the executrix, his mother. They alleged that the accounts of the estate were all along kept by Nirendra Nath Sen with the help and assistance of the plaintiffs, that he for some time had looked after the estate for the 1st defendant Srimati Hemangini Dasi. That they had all along been ready and willing to come to an amicable settlement with the 1st defendant regarding the partition of the testator's estate, and that the object of the plaintiff's suit was merely to harass the defendants, and lastly they submitted that no Receiver should be appointed to take charge of the property.

Mr. Chakravarti (with him *Mr. S. K. Mullick* and *Mr. A. N. Chaudhuri*) for the plaintiffs. The testator can deprive the widow of her share in his property on partition. *Debendra Coomar Roy Chowdhry v. Brojendra Coomar Roy Chowdhry* (1), *Strange's Hindu Law*, Vol. I, page 171, *Shama Charan's Vyavastha* 46, the *Dayabhaga Chapter III, section 2, verses 29, 30*. *Mayne's Hindu Law* (7th edn.), page 616, *Sirkar's Hindu Law* (3rd edn.), page 228, and *Ramawati Koer v. Manjhari Koer* (2) referred to. The case of *Kishori Mohun Ghose v. Moni Mohun Ghose* (3) is distinguishable from the present case. A widow on partition of her husband's property is not entitled to have the whole of the property charged with her maintenance, but only that portion of it, which is allotted to her son on partition. *Kedar Nath Coondoo Chowdhry v. Hemangini Dassi* (4). A share allotted to a mother does not become hers absolutely, so as to pass her *stridhan* heirs. *Sorolah Dossee v. Bhoobun Mohun Neoghy* (5).

Mr. B. C. Mitter and *Mr. B. K. Lahiri* for the 2nd defendant, Nirendra Nath Sen. Is the widow entitled to a share, which she inherited from her son, who is now dead, and having inherited this, can she again claim a share? I submit she cannot. If the Court holds that there is a disposition in my

(1) (1890) I. L. R. 17 Calc. 886.

(3) (1885) I. L. R. 12 Calc. 165.

(2) (1906) 4 C. L. J. 74, 77.

(4) (1886) I. L. R. 13 Calc. 336.

(5) (1888) I. L. R. 15 Calc. 292.

favour then *Debendra Coomar Roy Chowdhry v. Brojendra Coomar Roy Chowdhry* (1) is conclusive. We start in this case with a disposition, which is not binding under the Hindu Law. I submit this is a case of a will and not an intestacy: Phillips and Trevelyan's Hindu Wills, page 110, *Jugmohandas Mangaldas v. Sir Mangaldas Nathubhoy* (2), *Bhagabati Barmnya v. Kali Charan Singh* (3). No technical words are required to construe the gift by a testator. Hindu Wills Act, section 51, Theobald on Wills, Chapter XXXI, page 329. Since the Inheritance Act the heir takes as purchaser. When joint family property has been partitioned by the sons after their father's death, the widow shares equally with each of the sons, if however she is left property by her husband either by gift or legacy she is entitled only to so much as taken together with what she has received would make her share equal to that of each of her sons: *Kishori Mohun Ghose v. Moni Mohun Ghose* (4), Mayne's Hindu Law, page 618. As to the form of a decree in a suit of this nature, see the case of *Jodoonath Dey Sircar v. Brojonath Dey Sircar* (5). The case of *Jugomohan Haldar v. Saradamoyee Dossee* (6) does not arise, unless the Court holds there is no gift to the sons under the will. *Ramawati Koer v. Manjhari Koer* (7) is direct authority on the nature of a mother's right. On the question of *res judicata* see *Ghela Ichharam v. Sankalchand Jetha* (8) and *Shib Charan Lal v. Raghu Nath* (9).

The Advocate-General (Hon'ble Mr. S. P. Sinha) and Mr. Dass for the 1st defendant. As mother and heiress entitled to a share, to which the son would have been, if he were alive to take it. I am entitled to a share estate on partition: Dayabhaga, Chapter III, section 31. What is deducted is *stridhan* property, and in so the widow takes absolutely, if not, she takes the nature of a widow and the moment she dies, it goes

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(1) (1890) I.L.R. 17 Calc. 886.

86) I. L. R. 10 Bom. 528, 576.

(5) (1874) 12 B. L. R. 385, 390.

05) I. L. R. 32 Calc. 992;

(6) (1877) I. L. R. 3 Calc. 149.

C. L. J. 482, 485.

(7) (1906) 4 C. L. J. 74.

85) I. L. R. 12 Calc. 165.

(8) (1893) I. L. R. 18 Bom. 597.

(9) (1895) I. L. R. 17 All. 174.

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back to the sons. The share given to the brother on partition to her sons is not her *stridhan* property ; that is to say, she is to get her share, if she does not get *stridhan* : *Sorolah Dassi v. Bhoobun Mohun Neoghy* (1). The fact that I got a share as heiress of my son does not disentitle me to take the other share : *Jugomohan Halder v. Sarodamoyee Dossee* (2). The rule that the mother should have a share is most useful to prevent brothers from partitioning. If by the will, the property is to be given to the sons then the case of *Debendra Coomar Roy Chowdhry v. Brojendra Coomar Roy Chowdhry* (3) is against me and I cannot get a share, but this does not exclude me from maintenance.

Apart from the will, I am entitled either to a share or to maintenance : *Joytara v. Ramhari Sirdar* (4). No provision made by a Hindu testator can deprive the widow of her indefeasible right to maintenance for her life as long as his estate remains. If the testator cannot deprive the widow of her right, *a fortiori* nobody else, who inherits the testator's estate, can. Mayne's Hindu Law, page 822, paragraph 609, and Dayabhaga, Chapter II, section I, verses 57 and 59, also section 2, verses 30 and 31, and *Jugal Kishore v. Maharajah Jotindro Mohun Tagore* (5) referred to. There should be some words of gift. The testator in his will is not considering the question of giving, he is considering the best way of having the property managed : *Debendra Coomar Roy Chowdhry v. Brojendra Coomar Roy Chowdhry* (3). If there is no gift, I am entitled to a share on the majority of the sons : *Kishori Mohun Ghose v. Moni Mohun Ghose* (6).

Mr. B. C. Chatterjee (*Mr. S. R. Dass* with him) for the defendants Jaganath Sen and Jagadish Sen adopted the arguments of the Advocate-General.

Mr. Chakravarti in reply. A mere direction to an executor to pay and transfer is sufficient to show that there is a gift, *In re Bennett's Trust* (7), *In re Wrey* (8), *In re Bevan's Trusts* (9).

(1) (1888) I. L. R. 15 Calc. 292.

(2) (1877) I. L. R. 3 Calc. 149.

(3) (1890) I. L. R. 17 Calc. 886.

(4) (1884) I. L. R. 10 Calc. 638.

(5) (1884) L. R. 11 I. A. 66, 72.

(6) (1885) I. L. R. 12 Calc. 165.

(7) (1857) 3 K. and J. 280.

(8) (1885) L. R. 30 Ch. D. 507.

(9) (1887) L. R. 34 Ch. D. 716.

Theobald on Wills, page 584. The case of *Kishori Mohun Ghose v. Moni Mohun Ghose* (1) is distinguishable from the present.

There cannot be any *res judicata* with regard to any question of law. If there is a gift, then *Debendra Coomar Roy Chowdhry v. Brojendra Coomar Roy Chowdhry* (2) shows that the widow cannot take a share, but that she is entitled to maintenance provided she needs it : See Sama Charan's *Vyvastha*, page 46. If the widow does not come in as a sharer with her sons on the ground that the testator gave his entire property to his sons, then she is entitled to maintenance. *Maharani Beni Pershad Koeri v. Dudh Nath Roy* (3). Under the will the testator did contemplate a surplus and we are entitled to see what the widow received. There should therefore be an enquiry calling upon her to give an account of her dealings with the property.

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Cur. adv. vult.

CHITTY J. This is a suit by two of the six sons of the late Baikanta Nath Sen against their mother and three brothers. Their mother Srimati Hemangini Dasi is now sued in her capacity as executrix of the will of her husband, in her personal capacity, and also as heiress and legal representative of the sixth son, Jagatpati Sen, who died on the 17th April 1907, after the suit was first instituted. The present suit was first instituted on the 20th August 1906. In consequence of the leave under Clause 12 having been informally granted, it was withdrawn and instituted afresh on 14th February 1908. The object of the suit is to have the will of Baikanta Nath Sen finally construed, and to have the property partitioned among those persons, who are entitled to it. An account is prayed for against Hemangini Dasi and, if necessary, administration and other consequential reliefs.

The main question for my determination is, whether Hemangini Dasi is entitled on partition not only to the share of her deceased son Jagatpati Sen (which is admitted), but

(1) (1885) I. L. R. 12 Calc. 165. (2) (1870) I. L. R. 17 Calc. 836.

(3) (1899) 4 C. W. N. 274.

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also to another share as a mother on her sons' dividing the property among themselves. The solution of this question appears to me to rest solely on the construction to be put upon the will. If that will contains an express gift of Baikanta Nath Sen's property to his sons, then the right to the widow to a share on the partition is defeated : See *Debendra Coomar Roy Chowdhry v. Brojendra Coomar Roy Chowdhry* (1), and she takes only the share inherited from her son Jagatpati, i.e., 1-6. If on the other hand the will merely operates to postpone the partition and the sons take the property as on an intestacy, it appears clear from the texts and the authorities, that the widow is not deprived of her share, as such, by reason of her having inherited a share from a deceased son ; that is to say, in that case she would take 2-7ths.

Baikanta Nath Sen died on the 16th of April 1905 and his will, which was made in the year 1890, was duly proved by his widow, the sole executrix. The will directed that the property should be divided among his sons in equal shares, when his youngest son Jagatpati attained the age of 21 years. This happened on 1st August 1906. In 1895 the present plaintiffs filed a suit (No. 592 of 1895) in this Court claiming (as they now do) partition of the property. That suit was heard by Ameer Ali J., who decided that there was an absolute gift of the income of the whole estate to the executrix to be applied by her at her sole discretion up to the date fixed by the testator for division among his sons : that the postponement of their enjoyment was therefore valid ; and that that suit was premature. It was accordingly dismissed. The learned Judge also held that there was no gift whatsoever to the sons, but merely a postponement of the partition. It would seem, however, that the decision of this last question was not absolutely necessary for the determination of that suit, and it cannot therefore be regarded in any way as *res judicata* between the parties. An issue was also raised in that suit, but not decided, whether the widow would be entitled to a share on partition. The translation of the will, which was

(1) (1890) I. L. R. 17 Calc. 586.

made for the purposes of probate, appears to be wanting in accuracy. Counsel on both sides have taken objections to it, Mr. Chakravarti criticising the translation of clause 1 and the Advocate-General that of Clauses 4, 6 and 7. With their assistance and that of my interpreter I have had no difficulty in ascertaining the true meaning.

Clause 1 should run : Upon my demise my moveable and immoveable properties shall vest (*benoisto*) and all affairs in connection therewith shall be performed according to the provisions hereof.

Clause 4 : The said executrix shall, regard being had to the condition of my property, defray the necessary expenses, &c., &c.

Clause 6 : The Government securities, which I have made to stand in the name of my wife, Srimati Hemangini Dasi, my sons shall have no right thereto.

Clause 7 : On my youngest son Sriman Jagatpati Sen attaining the age of 21 years the said executrix shall divide my properties among my sons in equal shares (*tullanse bibhag koria diben*).

The opinion expressed by Ameer Ali J. is not binding upon me, but it is entitled to weight and I should not venture to differ from it, unless I was compelled.

After giving the will my best consideration however I have arrived at the same conclusion, namely, that it contains no gift to the sons, but merely operates to postpone partition to a particular date, with directions as to management ; in the meantime the property being vested in the executrix for the latter purpose. I can find in the will no words of gift or words that can be interpreted as such. The sons take as the law prescribes and not by any bequest of their father. In this respect the case appears to me to be not distinguishable from the case of *Kishori Mohun Ghose v. Moni Mohun Ghose* (1). It is true, that in that case there was no intermediate gift, though the testator directed that the executors should manage the estate, until his youngest son attained majority. The

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Hemangini Dasi is entitled to 2/7ths, 1/7th as heiress of her deceased son Jagatpati Sen, and the other 1/7th in her right as a Hindu mother on partition. Enquire of what that estate consisted (1) at the death of Baikanta Nath Sen, (2) at the date fixed by the testator for partition, viz., 1st August 1906 Hemangini Dasi to account for all receipts and disbursements subsequent to the last-mentioned date (this is consented to by the Advocate-General on her behalf). Inquire what *stri-dhan* property has come to Srimati Hemangini Dasi from her husband and take it into account in estimating the 1/7th share, which she takes as mother on the partition.

Costs of all parties of this suit, including reserved costs, to come out of the estate. Commissioner for partition to be named by the parties before the Registrar within a fortnight.

Commissioner to have power to make separate returns as to the moveable and immoveable properties respectively. Commissioner to have liberty to sell the properties. Executrix to divide the approximate net income in the meantime among the various beneficiaries.

Attorney for the plaintiffs : *C. C. Bose.*

Attorneys for the defendants : *Bonnerjee and Halder, A. K. Thakur, K. K. Dutt and P. C. Law.*

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direction there also was to "divide the estate amongst the sons in accordance with the *shastras*." I do not think that the addition of the words "in accordance with the *shastras*" can make any difference. In either case the sons would take according to the Hindu Law. There, as here, there was no bequest to the sons, but merely directions as to management for a certain time and then partition. I cannot see that this ruling has been in any way affected by the case of *Sorolah Dossee v. Bhooban Mohun Neoghy* (1), which decided that the mother's share is taken, not from the father's estate by inheritance or by reason of survivorship, but from the sons, in lieu of or by way of providing for that maintenance, to which she is entitled as against them.

If the mother is entitled, as I think she is, to a share on the partition, her right is not affected by the fact that she has already inherited a share from one of her sons. See *Jugomohan Haldar v. Sarodamoyee Dossee* (2). That ruling of Kennedy J. is founded on the text in the *Dayabhaga*, Ch. III, S. II, para. 31, and there appears to be no doubt as to its correctness. The only other matter, which I need notice, is one as to which there is no dispute. It is conceded that in estimating the share, to which the widow is entitled on partition, credit must be given for any property, which she has received as *stridhan* from her husband's estate, *e.g.*, in this case the Government securities mentioned in Clause 6 of the will. The share, which she takes as heiress of her son Jagatpati Sen, is not *stridhan*, in that she has only a woman's estate. As to setting off *stridhan* property, which has come to her, See *Jodoonath Dey Sircar v. Brojonath Dey Sircar* (3), and *Kishori Mohun Ghose v. Moni Mohun Ghose* (4).

In the view that I take of the case it is unnecessary to discuss the question of the widow's right to maintenance. There will be a decree as follows : Declare that of the estate of Baikanta Nath Sen, deceased, the plaintiffs and the male defendants are entitled each to 1/7th absolutely, and that Srimati

(1) (1888) I. L. R. 15 Calc. 292.

(2) (1877) I. L. R. 3 Calc. 149.

(3) (1874) 12 B. L. R. 385.

(4) (1885) I. L. R. 12 Calc. 165.

Hemangini Dasi is entitled to 2/7ths, 1/7th as heiress of her deceased son Jagatpati Sen, and the other 1/7th in her right as a Hindu mother on partition. Enquire of what that estate consisted (1) at the death of Baikanta Nath Sen, (2) at the date fixed by the testator for partition, *viz.*, 1st August 1906 Hemangini Dasi to account for all receipts and disbursements subsequent to the last-mentioned date (this is consented to by the Advocate-General on her behalf). Inquire what *stri-dhan* property has come to Srimati Hemangini Dasi from her husband and take it into account in estimating the 1/7th share, which she takes as mother on the partition.

Costs of all parties of this suit, including reserved costs, to come out of the estate. Commissioner for partition to be named by the parties before the Registrar within a fortnight.

Commissioner to have power to make separate returns as to the moveable and immoveable properties respectively. Commissioner to have liberty to sell the properties. Executrix to divide the approximate net income in the meantime among the various beneficiaries.

Attorney for the plaintiffs : *C. C. Bose.*

Attorneys for the defendants : *Bonnerjee and Halder, A. K. Thakur, K. K. Dutt and P. C. Law.*

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APPELLATE CIVIL.

Before Mr. Justice Brett, Mr. Justice Mitra and Mr. Justice Coxe.

PROSANNO KUMAR BOSE

v.

SARAT SHOSHI GHOSH.*

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Hindu Law—Pitridatta Ayautuka Stridhan, succession to—Son or married daughter, preferential heir—Dayabhaga—"Kanya,"— meaning of.

Under the Dayabhaga School of Hindu Law, a son is the preferential heir to a married daughter to *pitridatta ayautuka stridhan* property of the mother.

The word "*kanya*" in Dayabhaga, Chap. IV, sec. ii, para. 16, means an unmarried daughter.

Ram Gopal Bhattacharjee v. Narain Chandra Bandopadhyaya (1), followed.

SECOND appeals by the plaintiffs, Prasanna Kumar Bose and others.

These appeals arose out of four suits brought by the four plaintiffs to recover possession of certain immoveable property on declaration of title thereto.

The plaintiffs are the sons and the defendants are the married daughters of one Saroda Moyi Basu. The property in dispute was the *pitridatta stridhan* of the said Saroda Moyi, which was given to her by her father by a deed of gift, dated the 15th of June 1853. The gift was made after her marriage. On the 7th of October 1903 she died, leaving four sons and three daughters surviving her. Three of the sons applied to the Collector to be registered as heirs by right of inheritance from their mother. The applications were opposed by the daughters,

* Appeal from Appellate Decree, No. 2095 of 1906, against the decree of Ananda Nath Majumdar, Subordinate Judge of Mymensingh, dated Aug. 16, 1906, reversing the decree of Syama Charan Ukil, Munsif of Tangail, dated March 27, 1906, and three other analogous appeals, Nos. 2441, 2442 and 2443 of 1906.

(1) (1905) I. L. R. 33 Calc. 215; 10 C. W. N. 510; 3 C. L. J. 15.

and the learned Collector passed an order on the 24th of August 1904, directing the names of the daughters to be registered, under the Land Registration Act, as proprietors of the property by right of inheritance from Saroda Moyi. Subsequently, the four brothers instituted the aforesaid four suits.

The defendants *inter alia* pleaded that they were the preferential heirs, and as such the plaintiffs' suits ought to be dismissed. The Court of first instance, in the absence of the defendants, decreed the plaintiff's suits, holding that the property was *ayautuka stridhan* of the mother, and that the plaintiffs as sons were preferential heirs to the married daughters.

On appeal, the learned Subordinate Judge set aside the judgment of the Court of first instance and dismissed the suits.

Against these decisions the plaintiffs appealed to the High Court.

The appeal came on for hearing before Mr. Justice Brett and Mr. Justice Coxe, and there being a difference of opinion their Lordships delivered the following judgments :—

BRETT J. The appellants in these four appeals are the four sons and the respondents are the three married daughters of Saroda Moyi Basu. On the 15th June 1853, Saroda Moyi received a gift from her father of taluk Roy Chandra Sarma No. 5480. This was after her marriage. On the 7th October 1903 she died, leaving four sons and three daughters her surviving. Three of the sons, other than the appellant in appeal No. 2095 of 1906, applied to the Collector to be registered as heirs of the taluk by right of inheritance from their mother. They were opposed by the three daughters, and, on the 24th August 1904, the applications of the sons were refused and an order was passed to register the three daughters as proprietors of the taluk by right of inheritance from Saroda Moyi Basu. The four brothers then filed four suits on the 5th July 1905 and following days, praying for declaration of their title each to one-fourth share in the taluk and for recovery of possession.

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In the Court of first instance the suits were heard *ex parte* in the absence of the defendants, and were decreed, the Munsif holding that the taluk was *ayautuka stridhan* of the mother and that the plaintiffs as sons were preferential heirs to the married daughters.

On appeal the lower Appellate Court has set aside the judgment and decree of the Munsif in all the cases and has dismissed all the suits.

The plaintiffs, the four sons, have appealed to this Court in four appeals. These have been heard together and will all be governed by this judgment.

Admittedly the taluk, which is the subject of the present litigation, is the *pitridatta ayautuka stridhan* of Saroda Moyi Basu, and the question, which we have to decide, is whether the sons or the married daughters are the preferential heirs.

The learned Subordinate Judge has gone with great care and detail through the various authorities, and has come to the conclusion that the balance of authority is strongly in favour of the married daughters. In this appeal it has been argued by the learned Counsel for the appellants that the learned Subordinate Judge has erred in law in the view which he has taken of those authorities, and that in fact they support the contrary view that the sons are the preferential heirs.

The determination of the matter in dispute depends on the construction, which should be placed on the passage in paragraph 16, s. 2, Chapter IV of the edition of the *Dayabhaga* of *Jimutavahana* (as translated by Colebrooke). In that passage *Jimutavahana* has adopted the law as laid down by *Manu* in *Sloka 198, Chapter IX*. The passage, which is given in the vernacular in the judgment of the Subordinate Judge, runs as follows :—"As for a passage of *Manu*. "The wealth of a woman, which has been in any manner given to her by her father, let the Brahmini damsel take ; or let it belong to her offspring." Since the text specifies "given by her father," the meaning must be that property, which was given to her by her father even at any time other than her nuptials, shall

belong exclusively to the daughter, and the term Brahmini is merely illustrative, indicating that a daughter of the same tribe inherits." The words used, which are translated as the 'Brahmini damsel,' are '*Brahmini kanya*,' and the whole contest has centred round the point, whether '*kanya*' should be translated to mean generally any daughter, and so to include married or widowed daughters, or should be confined to the unmarried daughters alone. If the first meaning be accepted, the defendants must succeed in these suits; if the second be preferred, the plaintiffs must succeed.

Now it is suggested by the learned Counsel for the appellants that the first and obvious way to ascertain the meaning of the word "*kanya*" in the passage is to search through Chapter IV of the Dayabhaga, and see where the word "*kanya*" occurs, and what is the meaning which has been given to it. In s. I, the word is used twice as meaning a bride at the time of marriage, which may be taken to imply a maiden daughter. In s. II, irrespective of the passage in dispute, the term "*kanya*," wherever it occurs, means maiden or unmarried daughter. In s. III, "*kanya*" is used in the same sense, except in verses 32 and 33. These are the passages on which the Subordinate Judge relies to expose, as he says, the fallacy of the hypothesis that the word "*kanya*" is used by Jimutavahana in the restricted sense of unmarried daughter. It is unfortunate that the two passages, on which the Subordinate Judge relies, are held by some commentators to be of doubtful authenticity, and by others have been pronounced to be interpolations, and that in a case on the Original Side of this Court, lately heard by a Special Division Bench

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Any argument based on the use of the word "*kanya*" in modern conversation and literature seems to me to be dangerous. In the course of 300 years words in all languages change and modify their original meaning.

The other method of ascertaining the meaning of the word "*kanya*" as used in the passage is to look first to the context, and then to enquire and ascertain how the passage has been interpreted by other authors and commentators. The decision of this case depends, as I have already noticed, on the meaning to be given to the word "*kanya*" in that passage.

Now, in dealing with the question by the light of opinions expressed by authors and commentators, we are met with a difficulty, which the Subordinate Judge has either not recognized or ignored, that these high authorities, in the works which they have produced and in the different editions of their works, have contradicted themselves and have displayed a wavering of opinion, which cannot but have the effect of weakening confidence in them. In fact the point appears to be one of considerable doubt and difficulty, and in dealing with it I have endeavoured to give to the various authorities a most careful and impartial study and consideration.

Dealing with the question first on principle, we have it that the property in suit having been given to Saroda Moyi Basu after her marriage comes under the head of *ayautuka stridhan*. In the ordinary line of inheritance to *ayautuka stridhan* the sons succeed as preferential heirs to the married or widowed daughters. In the cases before us the property can only go to the married daughters, if the Hindu law makes an exception between *ayautuka stridhan*, which is "*pitridatta*," or given by the father, and ordinary *ayautuka stridhan*. The case for the defendants is that the texts, on which they rely, lay down a special line of succession to *pitridatta ayautuka stridhan*. Apparently it is not suggested that the exception is governed by either the principle of spiritual benefit or natural affection.

The learned Subordinate Judge has however suggested that it is governed by a "natural desire to make a sort of equitable distribution of the effects of the parents amongst children, male and female," and "to a very laudable desire on the part of the sages to provide for helpless and indigent relations." It does not however appear to follow of necessity that married daughters should be more indigent and helpless than sons.

Dealing next with the authorities we have first to take Chapter IV, s. 2, of the Dayabhaga, in which the passage occurs. The chapter first lays down the general rule of succession with regard to the separate property of a woman, and provides that it devolves in the first instance in equal shares on her sons and unmarried daughters, and in support of this view quotes passages from Sancha, Lichita and Devala. It then goes on to lay down the order of succession of other heirs, and in paragraph 11, when noting that the son's son is preferred to the daughter's son, it explains that the reason of it is that the married daughter is debarred from the inheritance by the son. In paragraphs 13 to 15 the nature of *yautuka stridhan*, or property received by a woman at her nuptials, is explained, and it is pointed out that the authorities, *e.g.*, Narada, Catyayana, and Yajnavalka, which give the preference to all unmarried daughters over sons, are referring to property of that class only. Then follows paragraph 16, in which the passage occurs, on which the decision of this case mainly depends. It deals with property given to a woman by her father "in any manner" "even at any time besides that of the nuptials," and provides that it shall be taken by the Brahmini damsel, or let it belong to her offspring. "Her offspring" is generally accepted as meaning the offspring of the deceased. The next two passages in the paragraph offer a possible explanation of the use of the word "Brahmini." The concluding passage runs: "Such is the meaning of the passage, for else according to the preceding interpretation all the texts, which declare the equal right of the son and daughter to the mother's property in certain cases

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would be incongruous." The texts here referred to are those dealt with in the preceding paragraphs of the section, and which lay down the general rule that the sons and unmarried daughters equally divide the property of the mother, and the passage seems to lay down that the paragraph provides in respect of *ayautuka stridhan* received from a father an exception to that rule, and nothing more.

The succeeding paragraphs 17 to 24 seem clearly to go back to paragraph 13 and to deal with the text referred to in that paragraph. They explain that the term "her issue" in the text of Narada refers to the issue of the mother and not of the daughters. S. 13, however, distinctly provides that the texts relate only to the (*yautuka*) wealth given at the nuptials because these passages contradict the text of Devala cited in paragraph 6. That text runs: "A woman's property is common to her sons and unmarried daughters, when she is dead."

Paragraphs 22 and 23 go on to lay down the line of succession to the property of a woman received at her nuptials, and the passages following explain how the order of succession is modified by the form adopted at the time of marriage.

For the appellants it is argued that paragraph 22 resumes the discussion of the succession to *yautuka stridhan* from paragraph 13 and that the intervening paragraph 16 alone deals with the succession to *pitridatta ayautuka stridhan*, and provides in the case of such property the exception to the general rule of succession that the unmarried daughters succeed in preference to the sons, and not jointly with them. This view is supported by the order of succession to *pitridatta ayautuka stridhan*, which is given in the synopsis of Srikrishna at the end of Chapter IV.

For the respondents it is argued that the word "*kanya*" in paragraph 16 is used generally to include all daughters; that therefore all daughters, whether unmarried, married, or widowed, are preferred to sons, and that is the view, which Srikrishna himself adopted in his *Dayakrama Sangraha*. Further, it is argued that the discussion in the subsequent

paragraphs of the words "her issue" would be unnecessary, if the expression "*Brahmini kanya*" did not cover married as well as unmarried daughters of the deceased. This contention does not, however, seem to be sustainable for the discussion in paragraphs 17 to 21 seems clearly to refer to the meaning of the words "her issue" as used in the text of Narada in paragraph 13.

It is not easy to determine the exact meaning of the text of the *Dayabhaga*, but the synopsis in which Srikrishna gives the order of succession shows clearly enough that he then interpreted it to mean that the unmarried daughters alone were preferred to sons in the succession to property given to a woman by her father not at her nuptials.

The next authority we come to is the *Dayakrama Sangraha* of Srikrishna. This is described in the preface as containing a good compendium of the law of Inheritance according to Jimutavahana's text as expounded in his commentary on the *Dayabhaga*. Chapter II deals with the order of succession to the peculiar property of a woman. S. 1 deals with the succession to the property of a maiden ; s. 2 defines the peculiar property of a married woman ; s. 3 deals with the succession to the separate property of a woman, when received at her nuptials, and s. 4 with the separate property not received at her nuptials. Then comes s. 5, which is important for the purposes of this case, and which deals with the succession to the separate property of a woman, when given to her by her father. Paragraphs 1, 2 and 3 deal with the order of succession. It has been pointed out to us that in the original the text is not divided into paragraphs, and that the paragraphs 1 and 2 and the first half of paragraph 3 down to "received at nuptials" form one paragraph. These passages, as well as the remaining part of paragraph 3 and paragraph 4, have been interpreted by the Subordinate Judge to mean that the order of succession to *ayautuka stridhan* is the same as that of *yautuka stridhan* given by the father, and is first the maiden daughter, then the married daughters, who have, or are likely

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to have, male issue, then the barren and widowed daughters, and on these failing, the sons and the rest. This construction is supported by the learned pleader for the respondents, who argues that the latter portion of paragraph 3 and paragraph 4 merely confirms the preceding paragraphs.

The meaning and effect of the four paragraphs have been considered by a Bench of this Court in the case of *Ram Gopal Bhattacharjee v. Narain Chandra Bandopadhyaya* (1). In that judgment the learned Judges express the opinion that the first paragraph of s. 5 should be taken to apply to the separate property of a woman given to her by her father both at her nuptials and at any time other than her nuptials, that is to say, to both *yautuka* and *ayautuka stridhan*, that ss. 2 and 3 should be taken to lay down the rule of succession in the case of *yautuka stridhan*, and paragraph 4 the right of succession applicable to *ayautuka stridhan*. They take the words "as in the case of property received at nuptials" in the 3rd paragraph to mean that it refers to such property only. The learned Judges also point out that, if this view be accepted, there will be no difference between the line of succession as laid down by Srikrishna in his synopsis to Chapter IV of the *Dayabhaga* and in the section of his *Dayakrama Sangraha*, with which we have been dealing. The learned pleader for the respondents contends that it is impossible to reconcile the views expressed in the two works, and that the line of succession given in the *Dayakrama Sangraha* should be accepted as correct.

One thing is, however, clear that, if the two opinions be held to be irreconcilable, the authority of the learned commentator is considerably weakened.

The next authority is the *Dayatatwa* by Raghunandan. Chapter X deals with the succession to woman's property. The first paragraph lays down the general rule that a woman's property is common to her sons and maiden daughters, when she is dead, and the succeeding paragraphs up to paragraph

(1) (1905) I. L. R. 33 Calc. 315; 10 C. W. N. 510; 3 C. L. J. 15.

10 deal with the succession on failure of sons and married daughters. Paragraph 12 deals with property received by a woman at the time of her marriage and prefers the married daughters to the sons. Paragraph 16 deals with *ayautuka stridhan* received from the father and quotes the passage from Manu relied on in the Dayabhaga, Chap. IV., s. 2, para. 16. Paragraph 17 provides that on default of these the son succeeds, quoting in support the authority of Manu. The question then arises whether this applies to *ayautuka stridhan* or whether it follows in natural order of sequence paragraph 13, which deals with *yautuka stridhan*. The Subordinate Judge has accepted the former alternative, but here, as in the other authorities, the succession to *ayautuka stridhan* is introduced seemingly in parenthesis, and it seems open to doubt, whether paragraph 17 really refers to it or to *yautuka*. Paragraph 18 points out that similarly also other texts declaring the succession of daughters previous to that of sons refer to this description of woman's property. This description may refer to "property given by the parents" as mentioned in paragraph 11 or to nuptial presents as mentioned in paragraph 13.

Mr. Macnaghten, in his Principles and Precedents of Hindu Law, published in 1829 in Vol. I, pp. 39 and 40, follows, in the case of *ayautuka stridhan* received from the father, the line of succession given by Srikrishna in his synopsis at the end of Chapter IV of the Dayabhaga.

Sir Thomas Strange, in his Elements of Hindu Law, Vol. I, p. 247, notices the intricacy with which the succession to woman's property is regulated, and in the Appendix, Vol. II, p. 403, extracts the order of succession as given in the synopsis of Srikrishna to Chapter IV of the Dayabhaga, and states that it is the settled order of succession to the separate property of a woman.

Neither of these learned authors could claim to be, as those previously mentioned, expounders of the text of the Hindu law, but both had large experience in the Courts of law, and presumably were well aware of the authorities that were accepted in them.

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The next authority is the Vayavastha Darpana of Shama Churn Sircar. In his first edition, published in 1859, he adopts the exposition of the law of succession to the property of a woman received from her father at any time other than her nuptials given by Srikrishna in his synopsis attached to Chapter IV of the Dayabhaga in preference to that given in the Dayakrama Sangraha, because, being consonant with the Dayabhaga, it is respected above the Dayakrama Sangraha. He also accepts the view that in the passage in Chapter IV, s. 11, para. 16 of the Dayabhaga "*kanya*" means "maiden daughter."

In the second edition of the Vayavastha Darpana published apparently in 1867 (see pp. 718-719), the learned author accepts the order of succession to the property of a woman given to her by her father at any time other than at her nuptials, given in Srikrishna's commentary on the Dayabhaga. In a remark, which follows the portion of the text dealing with this subject, the author notices that in the Dayakrama Sangraha Srikrishna lays down that succession to the property given by a father to his daughter, whether at the time of her marriage or at any other time, is regulated according to the principles applicable to the property received at nuptials and he expresses the opinion that this view is supported by the note of Jimutavahana in the Dayabhaga on the passage in Manu. But he goes on to say "the order of succession as given in the commentary on the Dayabhaga seems to be more consistent with reason, for in the succession to this kind of *stridhan*, why should the son, who confers the greatest benefit on the mother, be postponed even to the widowed and barren daughters, (who confer no spiritual benefit on her), in the same way as in the succession to the *ayautaka* property, which descends to the daughters in preference to the son solely on account of certain texts of the sages and especially the text of Manu, Chapter III, v. 49. The text and note indicate the opinion of the learned author that in the line of succession sons should be preferred to daughters other than unmarried daughters.

In the edition of his work published in 1883 after his death, a different order of succession is adopted, and all daughters married and widowed are preferred to the sons.

Here, again, we have a learned commentator expressing diametrically different views at different times, a circumstance which goes to weaken confidence in him as an authority.

Among later commentators we find in the work on Hindu Law of Marriage and Stridhan by Dr. (now Sir) Gooroo Das Banerjee, that the learned author in the first edition remarks that the order given by Srikrishna's commentary on the Dayabhaga is "generally" accepted as correct, while in the later edition, p. 408, he qualifies it by saying it is accepted as correct by some authorities. The learned author points to the difference between the authorities on the point, and expresses no certain opinion himself.

Jogendro Smarta Siromoni, in his commentary on Hindu Law, published in 1885 at page 398, deals with *pitridatta stridhan*. He points out first that there is a special rule with regard to this class of property, that it goes in the first instance to the unmarried daughter alone. He notices that in the Dayakrama Sangraha Srikrishna has laid down that the course of succession to *pitridatta* is similar to that in the case of *ayautuka*, but he goes on to say that in Srikrishna's commentary on the Dayabhaga he has expressed a different opinion. He however notices that property given by the father before or after marriage must be regarded as *ayautuka*, and the course of successions to such property must be the same as in respect of any other *ayautuka*, except so far as the operation of the general rules is qualified by special texts, and he adds that there is no direct authority for saying that all daughters succeed to the *pitridatta* before the sons. The learned Subordinate Judge in dealing with this authority fails to notice that the opinion above expressed is clearly in favour of the view that the sons succeed to *pitridatta ayautuka stridhan* after the unmarried daughters. In commenting on the judgment of Mr. Justice Mitter in the case of *Jodoo Nath Sircar v. Basunt*

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Coomar Roy Chowdhry (1), the learned author remarks that the conflict between Srikrishna in the Dayakrama Sangraha and his master in the Dayabhaga cannot be reconciled except by showing that the text of the Dayabhaga is capable of being interpreted in the manner Srikrishna has done.

Babu Golap Chandra Sarkar Sastri in his work on Hindu Law notices the conflict between the Dayakrama Sangraha and Srikrishna's synopsis to Chapter IV of the Dayabhaga in respect of the line of succession to *ayautuka stridhan*, which is given by a father at any time other than the nuptials, and notices that the question is beset with considerable difficulty arising from apparent contradiction.

Mayne, in his work on Hindu Law and Usage, 7th ed., p. 900, s. 673, accepts the view that all the daughters are preferential heirs to the sons.

Taking next the decisions of the Courts, we find that in the case of *Gopal Chunder Pal v. Ram Chunder Paramanik* (2) this Court refused to follow the Dayakrama Sangraha in respect to the order in which a brother or a husband were entitled to succeed to moveable property received by a woman from her father after her marriage, and relied in preference on the text of the Dayabhaga as being the paramount authority in the Bengal School.

In the case of *Ram Gopal Bhattacharjee v. Narain Chandra Bandopadhyaya* (3), to which reference has already been made, a similar view was accepted in respect of the mother's right to succeed to *anwadheya stridhan* of a childless woman in preference to her husband. The learned Judges in dealing with paragraph 16, s. 2, Chapter IV of the Dayabhaga expressed the opinion that, subject to the one variation made in that passage, "*yautuka* given by a father is inherited as other *yautuka*, and *ayautuka* given by the father is inherited as other *ayautuka*": and they attempt to reconcile the paragraphs 1

(1) (1873) 19 W. R. 264; 11 B. L. R. 286.

(2) (1901) I L. R. 28 Calc. 312.

(3) (1905) I. L. R. 33 Calc. 15; 10 C. W. N. 510; 3 C. L. J. 15.

to 4 of s. 5 of the Dayakrama Sangraha with this view in the manner already noticed in this judgment.

In the case of *Judoo Nath Sircar v. Bussunt Coomar Roy Chowdhry* (1) the exact words of the Dayakrama Sangraha have not been accepted and in preference an attempt has been made to reconcile them with the text of the Dayabhaga.

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The result of a careful examination of the commentators and authorities on Hindu law and of the cases, which have come before the Courts, in which the question of the succession to the *pitridatta ayautuka stridhan* of a woman has been considered, does not at all go to support the opinion expressed in rather over-confident terms by the Subordinate Judge in the lower Appellate Court that the balance of authority is heavily in favour of the married daughters being preferred to the sons.

If we rely on the Dayabhaga itself, and the earliest interpretation put on it by Srikrishna in his synopsis, we must hold that the sons should be preferred in the line of succession to the married daughters. If we take the words of the text of the Dayabhaga, we find that it is only in two exceptional passages, and those of doubtful authenticity, that the word "*kanya*" is used by itself in the Dayabhaga to mean a daughter in the generic sense. When the author intends to convey that meaning, the word "*duhita*" is used. "*Kanya*" is used to mean "a bride at the time of bridal" and "an unmarried damsel," and in fact the original meaning of the word appears to have been "a girl up to 10 years of age." According to the ordinary rule, unmarried daughters and sons succeed jointly to the separate property of their mother, and the question is whether in the passage of the Dayabhaga under consideration it was intended to give the unmarried daughters preference to the sons, or to give all the daughters preference to them. Certainly the use of the word "*kanya*" seems to go far to support the former conclusion.

To support the contention that the word "*kanya*" is used

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in the generic sense to include all daughters, the learned pleader for the respondents has relied on the passages in the Dayakrama Sangraha to which we have referred, and has argued that the learned Judges in the case of *Ram Gopal Bhattacharjee v. Narain Chandra Bandopadhyaya* (1), have failed to reconcile the discrepancy between these passages and the synopsis in the Dayabhaga, which it is contended are irreconcilable.

The texts of the ancient authors do not however yield readily to those methods of construction which we are able to adopt in dealing with books of recent date. The style is often involved. No rules of punctuation are observed, and matters are introduced in parenthesis, both in passages and in sections of the works, without any apparent system or rule. One of the learned Judges, who was a party to the decision under consideration, is a Sanskrit scholar, who was able to seek elucidation of difficulties by reference to the original texts. Under these circumstances, it seems to me that we should hesitate before differing from the view expressed in that judgment. The Dayakrama Sangraha is supposed to have been written by Srikrishna after his synopsis to the Dayabhaga, but as to this there is no certainty. At all events, there is nothing in the Dayakrama to explain why the learned author had modified his previous opinion, and therefore there is every reason to attempt to reconcile the two expressions of opinion, if it be possible. If that can be done in the manner adopted by the learned Judges in the case under notice, all further difficulties will disappear.

If such reconciliation be impossible, then it seems that the credit to be attached to Srikrishna as an authority is much weakened.

The meaning of the text of the Dayatattwa of Raghunandan is far from being clear owing to the introduction 'in parenthesis' of the reference to *ayautuka stridhan* given by the father.

Macnaghten and Strange both accept Srikrishna's synopsis

(1) (1905) I. L. R. 33 Calc. 315 ; 10 C. W. N. 510 ; 3 C. L. J. 15.

at the end of Chapter IV of the Dayabhaga as laying down the correct law.

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Shama Churn Sircar in his Vyavastha Durpana wavers in opinion, and it is remarkable that, in the first and second editions, which were published during his lifetime and in which he follows Srikrishna's synopsis and accepts the meaning of "*kanya*" to be unmarried daughter, he gives reasons for his conclusions, while in the third edition, which was published after his death, no reasons whatever for his change of opinion, (if in fact the opinion expressed in that edition be his), are mentioned.

Jogendro Smarta Siromoni refuses to accept the view that all daughters should be preferred to sons. The other learned authors invite attention to the difficulty, which has arisen, in interpreting the passage in the Dayabhaga owing to subsequent contradiction, but do not assist us to elucidate it.

The decisions of the Courts, to which we have referred, indicate that where there is a difference between the Dayakrama Sangraha and the Dayabhaga, the former has been rejected and the Dayabhaga followed.

Taking the passage of the Dayabhaga as it stands, and giving due effect to the use of the word "*kanya*", and taking also into consideration the context and the fact that the earliest interpretation of the text was in favour of giving the sons preference to the married daughters in the succession to the *pitridatta ayautuka stridhan*, the reasonable conclusion appears to be that the intention of the Dayabhaga was to lay down a general law of succession to *ayautuka stridhan*, and to make an exception in the case of such property received from a father only to the extent that in the first instance the unmarried daughter is preferred to the son. I see no reason to differ from the view taken by the learned Judges in the case of *Ram Gopal Bhattacharjee v. Narain Chandra Bandopadhyaya* (1) that the synopsis of Srikrishna to Chapter IV of the Daya-

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bhaga and the paragraphs in the Dayakrama Sangraha are capable of reconciliation.

I would, therefore, set aside the judgment and decree of the lower Appellate Court and decree the appeal and restore the judgment and decree of the Court of first instance with costs

As, however, my learned brother differs in opinion from me the case must be referred to the Honb'le the Chief Justice for orders under s. 575 of the Code of Civil Procedure.

COXE J. In this case the sole point in issue is, whether sons succeed in preference to married daughters to property given to a woman by her father at a time other than the time of nuptials; and the decision of this question turns exclusively, or almost so, on the further question, whether the word "*kanya*" in paragraph 16, s. 2, Chapter 4 of the Dayabhaga refers exclusively to unmarried daughters or includes all daughters. It will be convenient to deal with the authorities in order, and the first that must necessarily be considered is the Dayabhaga itself. The Dayabhaga deals first with the succession to woman's property generally, and lays down that the property of a woman goes on her death, first to her son and unmarried daughter, and then to the married daughters. The author then deals with the *yautuka* property, which he apparently regards as exceptional, and lays down that it goes on the mother's death to the daughters. Then comes the text on which this controversy hinges (iv, ii, 16). The author quotes a text of Manu, which runs, "The wealth of a woman, which has been in any manner given to her by her father, let the Brahmini damsel (*kanya*) take, or let it belong to her offspring." And as I have said, the controversy arising in this case turns principally on the question whether the word "*kanya*" is intended to refer only to the unmarried or to all daughters.

There is no dispute that the term means "daughter." It is not suggested that any girl, who was not a daughter, could by any possibility succeed. But it is strenuously argued that the word ordinarily means a maiden daughter only, and is

only used to signify daughters in general, when used in conjunction with the word *putra* (son). Particular reference is made to the use of the word in the text of Devala, quoted in paragraph 6 of the same section of the Dayabhaga, which runs, "A woman's property is common to her sons and '*kanya*,' when she is dead, but if she leave no issue, her husband shall take it, etc." It is curious that, if the word "*kanya*" here refers only to unmarried daughters, there is no direct reference to unmarried daughters at all, though admittedly they succeed before the husband. But it is not disputed that the word "*kanya*" in this passage means unmarried daughters only.

At the same time, it cannot be denied that the word is occasionally used to signify daughters generally, and the sense in which it is used in this passage must in my opinion be gathered from the context. It has been argued that the paragraphs succeeding paragraph 16 deal with the question whether in the text of Manu quoted above, the words "her offspring" refer to the daughter's offspring or the offspring of the deceased mother. And it has been argued that the fact that this point has been thought worthy of serious discussion shows conclusively that the word "daughter" must include married daughters, for obviously an unmarried daughter could not, in the eye of the law, have any offspring at all and therefore, if only unmarried daughters were referred to, there could be no controversy or discussion as to what was meant by the words "her offspring." To this argument there could, in my opinion, be no answer, if the paragraphs really referred to the text of Manu before quoted. But if I understand the paragraphs aright, they refer to a text of Narada quoted in paragraph 13, and not to the text of Manu at all. Still the fact remains that the author of the Dayabhaga deals with the succession to *yautuka* property in paragraphs 13, 14 and 15. He then deals with this special subject of the succession to *pitridatta* property. He then devotes paragraphs 17 to 21 to a possible misconception that might arise with regard to the succession to *yautuka* property laid down in paragraph 13. And then

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he goes on dealing with the succession to *yautuka* property generally. Taking the whole arrangement of the section, with the parenthetical reference to the succession to *pitridatta* property in paragraph 16 embodied in the general discussion of the succession to *yautuka* property, it seems to me that the author of the Dayabhaga regarded *pitridatta* property as coming under the rules relating to *yautuka* property so far as daughters were concerned.

Ayautuka property goes first to the son and unmarried daughter, then to the other daughters. *Yautuka* goes first to the daughters and then to the sons. If really there were a third and entirely distinct order of succession to *pitridatta* property, it seems reasonable to suppose that in a work that is certainly not inattentive to detail, it would have been stated distinctly what it was.

It has been argued on behalf of the appellants that, if he intended that daughters as a class succeeded to *pitridatta* property, the author of the Dayabhaga would certainly have laid down their order of succession within the class. To me the fact that he has omitted to do so, and has merely stated the fact of the daughter's succession in a parenthesis embodied in the middle of the rules governing the devolution of *yautuka* property, in which the order of succession of daughters *inter se* is set out, seems to indicate that he did not regard the succession of the "*kanya*" to *pitridatta* property as any exception to the rule governing the succession to *yautuka* property. It must be remembered that the word "*kanya*" was not his own. He was quoting from the Code of Manu, which was in verse, and presumably subject to the laws of metre and style. He did not feel himself bound to assign any specific meaning at all to the word "*Brahmini*," and it may well be that he did not feel himself bound to attach a restricted meaning to the word "*kanya*." With reference to the words "or let it belong to her offspring" in the text under consideration it may be asked why a word signifying both male and female offspring should be used, if the text means that on failure of

daughters the property goes to the sons. It is clear, however, from the context that the word "offspring" cannot refer to all the children, but only to the children other than the "*kanya*." If therefore "*kanya*" means all the daughters, the word "offspring" must refer to the sons. If, on the contrary, the word "*kanya*" means unmarried daughter only, the text prescribes that in the absence of an unmarried daughter sons and married daughters inherit together, which is not suggested by any body. This consideration seems to me to support in some measure the view that the word "*kanya*" refers to all the daughters. I do not however lay any stress on this beyond saying that in my opinion the use of the word "offspring" is not inconsistent with the view that the term "*kanya*" refers to all the daughters.

Next comes the strongest authority on the side of the appellants, namely, the summary by Srikrishna, at the end of Chapter IV of the Dayabhaga, of the rules of succession prescribed in that chapter. This clearly lays down that in the case of *pitridatta* property not given at the time of marriage, the maiden daughter succeeds first, then the son, and then the other daughters.

It is argued, however, by the respondents that this authority has been destroyed by the fact that Srikrishna in his later work, "The Dayakrama Sangraha" (Chapter II, section 5) has laid down that the daughters succeed before the sons. It will be necessary to set out the first three paragraphs of the section in full. They run as follows :—

"In regard to the wealth given by a father to a woman at the time of the wedding, or antecedent or subsequent to it a maiden daughter inherits in the first place.

"2 After her a married daughter, who has, and one who is likely to have, male issue, inherit together.

"3. Next the succession devolves on the barren and widowed daughters, and in default of all daughters, the son and the rest succeed as in the case of property received at nuptials; for a text of Manu declares.—"The wealth of a

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woman, which has in any manner been given to her by her father, let the Brahmini damsel take or let it belong to 'her off spring.' "

It was held in *Ram Gopa Bhattacharjee v Narain Chandra Bandopadhyaya* (1), that though the first paragraph referred to both *yautuka* and *ayautuka pitridatta* property, the second and third could refer to *yautuka pitridatta* property only. This view was based principally on the words "as in the case of property received at nuptials," and on the fact that, if the second and third paragraphs referred to *ayautuka* as well as *yautuka pitridatta* property, it would be impossible to reconcile the Dayakrama Sangraha with the same author's synopsis of the Dayabhaga. It has been argued, however, before us that a consideration of the original text renders this view untenable. We are informed that the first two paragraphs and the third paragraph as far as the words "widowed daughters" form one sentence prescribing that the maiden daughter is first entitled to succeed, then the married daughter, and then the widowed daughter; and ending with the word "entitled" which applies equally to all the preceding nominatives. An entirely new sentence then begins with the words "In default of all the daughters." If this is so, and the fact has not been disputed before us, then although I have the greatest diffidence in dissenting from the view of the learned Judges in the case cited above, I find myself unable to understand how any distinction can be drawn between the first and the two following paragraphs in their relation to all kinds of *pitridatta* property. And it appears to me that the succeeding sentence—"In default of all daughters the son and the rest succeed as in the case of property received at nuptials; for a text of Manu declares—"The wealth of a woman, which has in any manner been given her by her father let the Brahmini damsel take," implies that in the view of Srikrishna at the time he wrote the Dayakrama Sangraha, the term "Brahmini damsel" was in effect synonymous with

(1) (1905) I. L. R. 33 Calc. 315; 10 C. W. N. 510; 3 C. L. J. 15.

“all daughters.” In paragraph 4, it is laid down that, whatever is given by the father “belongs first to the damsel and after her it goes to her offspring, her son.” This paragraph is to my mind conclusive that Srikrishna at the time he wrote the Dayakarama Sangraha regarded the term “*kanya*,” as including married daughters, since otherwise he could not have referred to their sons.

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Next comes the Dayatatwa of Raghunandan. Chapter X of this work begins by dealing with succession to *stridhan* generally. Then in paragraphs 12 to 15 the author deals with succession of *yautuka*. Paragraph 16 deals with the text of Manu that *pitridatta* property goes to the Brahmani damsel. Paragraphs 17 and 18 run as follows :—

“ 17. On default of these the son succeeds ; since Manu says ‘on default of daughters the inheritance goes to sons.’ ”

“ 18. Similarly also other texts declaring the succession of daughters previous to that of sons refer to this description of woman’s property.”

Then paragraph 19 begins, “On failure of sons and the others, a woman’s nuptial presents go to the husband.”

It is argued on behalf of the appellant that paragraph 16 is a parenthesis and that, at the end of it the author resumes the consideration of the succession to *yautuka* property. In this view, the words “on default of these” at the beginning of paragraph 17 mean “on default of the daughters mentioned in paragraph 13.” On the other hand, it is argued on behalf of the respondents that the words mean “on default of the Brahmani damsels mentioned in the preceding paragraph.” It seems to me that both views are tenable and that it would be unsafe to build any firm conclusion on this passage. I may say, however, that the repetition of the words “nuptial presents” in paragraph 19 tends in a small measure to show that the parenthesis about the *pitridatta* ends, and the discussion of *yautuka* property is resumed at that point.

The authority next quoted is Jagannath’s or Colebrooke’s Digest. It is difficult to base any conclusion on this work as

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it quotes both the text of Devala, to the effect that the son and maiden daughter together, and that of Katyayana, to the effect that the daughters succeed, and draws no clear distinction between *yautuka* and *ayautuka* property. But in quoting the text of Manu (paragraph cccxcv) the author construes it as laying down that the property of a childless wife shall go to the daughter of a Brahman co-wife, or to the issue of that daughter. So that it is clear that the author did not regard the term "*kanya*" as necessarily confined to an unmarried girl.

Subsequent commentators may be briefly referred to, although the case must be decided on the view that is taken of the earlier authorities. Macnaghten is wholly in favour of the appellant. Strange is claimed as being in his favour, but all that appears in that work is a reprint of Srikrishna's synopsis at the end of Chapter IV of the Dayabhaga. Jogendra Nath Bhattacharjya is in favour of the appellant's contention, but his views are in my opinion weakened by the distinction which he draws between the first and subsequent paragraphs of section 5 of the Dayakrama Sangraha. Golap Chandra Sarkar seems to have been unable to make up his mind on the point, and a still more remarkable instance of this indecision may be found in the work of Shama Charan Sarkar. In the first edition of the work of that learned author he seems to have been wholly in favor of the view urged by the appellant. In the second (section 464), he admitted that the Dayabhaga furnished full authority for the contrary view, but thought that reason required the postponement of the married daughters to the sons. But in the last edition of his work, published some months after his death, he went wholly round to the view, for which the respondents now contend. On the other hand, Mayne is wholly opposed to the view taken by the appellant.

I attach a good deal of importance to the comments in the second edition of Shama Charan Sarkar's *Vayavastha Darpan* and those in Mr. Justice Banerjee's work on *stridhan*. The first author gives the succession as laid down in Srikrishna's

Synopsis at the end of Chapter IV of the Dayabhaga. That was the order of succession, which he thought was right. He defends it as based on reason. But he admits, and, as it seems to me, reluctantly admits, that Srikrishna in the Dayakrama Sangraha lays down that succession to all *pitridatta* property is regulated according to the principles applicable to *yautuka* property, and then he goes on to say; "The above is not the solitary opinion of Srikrishna alone but also of Jimutavahan, as is evident from the following note." The note is a quotation of the paragraph 16 which has already been set out in full. Now, if the word *kanya* must necessarily mean an unmarried daughter, I cannot understand how Shama Charan Sarkar can have felt himself forced to admit that paragraph 16 was opposed to the view, which he was defending. For if the word "*kanya*" as we are now told, would necessarily convey to all Sanskrit scholars the signification "unmarried daughter," it is clear that the commentator must have seen at once that the Dayabhaga was not opposed to the synopsis and did not support the view that the order of succession to all *pitridatta* property was the same as that of succession to *yautuka*. And the fact that this evidently did not occur to him indicates strongly to my mind that the restriction of the meaning of the word "*kanya*" to unmarried daughters is untenable.

The same considerations apply, though in a less degree, to Mr. Justice Banerjee's observations on page 408 of his work on Marriage and Stridhan (second edition). Though he does not express any very decided opinion he seems to accept the order laid down in Srikrishna's Synopsis. But he observed that according to the Dayakrama Sangraha the order of succession was the same as for *yautuka* and that this "seems to be in accordance with the opinion of Jimutavahana and Raghunandan." And clearly, if the word "*kanya*" had conveyed to the learned commentator's mind the meaning of "unmarried daughter" only, he could have had no reason whatever for saying that it was the opinion of Jimutavahana, that the

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order of succession for all *pitridatta* property was the same as that for *yantuka*.

We have been referred to two cases, *Judoo Nath Sircar v. Bussunt Coomar Roy Chowdhry* (1) and *Gopal Chandra Pal v. Ram Chandra Pramanik* (2). But all that was held in the first of these cases was that the words "sons and the rest" in the *Dayakrama Sangraha* did not include collateral heirs, and this finding does not seem to me to have any bearing on the present case. The second case also has no real application to this case.

I think that the appellants have failed to show that the Subordinate Judge is wrong. The only clear authorities on the point are the two diametrically opposed statements of Srikrishna. If either of these is to be preferred, it should, I think, be the latest, namely, the *Dayakrama Sangraha*. Otherwise the decision of the case must turn on the question whether the word "*kanya*" in the *Dayabhaga* includes married daughters." The Subordinate Judge is of opinion that it does include them. The arrangement of that portion of the *Dayabhaga* indicates that the author intended to include them. The interpretation of Manu's text given in Jagannath's Digest, and in the *Dayakrama Sangraha*, indicate that the term was understood as including married daughters. Among the later commentators Babu Gooroo Das Banerjee and Shama Charan Sarkar, in the second edition of his work, while accepting the order of succession laid down in the synopsis, were at the same time of opinion that that order was opposed to the *Dayabhaga*, a view, which necessarily implies that they thought that the term "*kanya*" included married daughter. Against these authorities there are the clear opinions of Macnaghten and Jogendra Nath Bhattacharjee, which in their turn are opposed to that of Mayne. I find it impossible to hold on these authorities that the term "*kanya*" could not have been intended to include married daughters. I think

(1) (1873) 19 W. R. 264.

(2) (1901) I. L. R. 28 Cal. 311.

that it does include them, and, if this view is correct, these appeals must necessarily fail.

Accordingly I would dismiss these appeals, but I agree that they should be referred to another Judge or Judges under s. 575 of the Civil Procedure Code.

[Owing to this difference of opinion, the case was referred to a third Judge, Mitra J.]

Mr. B. Chuckerbutty (*Mr. B. K. Lahiri* and *Babu Mohini Mohun Chuckerbutty* with him) for the appellant.

Dr. Priya Nath Sen (*Babu Rajendra Chandra Guha* or *Babu Akhilbanthu Guha* with him) for the respondents.

MITRA J. The decision of the question of Hindu law raised in these appeals depends on the interpretation of Chapter IV, s. 2, para. 16 of the *Dayabhaga* of *Jimutavahana*, the paramount authority in the Bengal School. Other authorities may be followed, if there be any ambiguity in *Jimutavahana's* text. *Srikrishna* and *Raghunandana* undoubtedly deserve the greatest respect, but their opinions must yield to the authority of their great master, *Jimutavahana*, himself.

Chapter IV, s. 2, para. 16 of the *Dayabhaga* of *Jimutavahana* is as follows in *Colebrooke's* translation — "As for a passage of Manu, 'The wealth of a woman, which has been in any manner given to her by her father, let the Brahmini damsel take, or let it belong to her offspring' since the text specifies 'given by her father', the meaning must be, that property, which was given to her by her father, even at any other time besides that of the nuptials, shall belong exclusively to her daughter, etc." The text of Manu referred to in the paragraph is this in original :—

स्त्रियान्तु यज्ञवेदितं पित्रादत्तं कथञ्चन ।।
ब्राह्मणी तद्वर्त्त कन्या तदपत्यस्य वा भवेत् ॥

Chap. IX, v. 198.

The word "damsel" in the translation by *Colebrooke* represents the word "कन्या" in the original text. In *Jimutavahana's* commentary on it in paragraph 16, he also uses the

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word “कन्याः”. In the next sentence in that paragraph he uses the words ‘सद्वती दुहिता ब्राह्मणी कन्या’. In this last sentence, the word ‘दुहिता’ is evidently used in contradistinction to the word ‘कन्या’.

The question then arises.—In what sense has the word “कन्या” been used by Manu and Jimutavahana? The arguments before me, as well as those before my learned colleagues, Brett and Coxe, JJ., related principally to the meaning of the word ‘कन्या’ and the sense in which it was used by Jimutavahana. Does it mean an unmarried daughter, or, daughters generally?

The word “कन्या” primarily means a maiden daughter, a virgin “कुमारी” (kumari). That is the interpretation of the word given by the celebrated lexicographers Amar Singh and Hem Chandra. In the *Medini* also, the first synonym of “कन्या” is “कुमारी” (maiden daughter). The same meaning is given in the *Sardakalpadruma* by Rajah Sir Radha Kanta Deb Bahadur, and all the later lexicographers. Professor H. H. Wilson in his Dictionary also gives the same meaning: “A maid, a virgin, a girl of nine or ten years of age.” Later writers have occasionally used the word to mean “a woman” “नारी”—from the particular to the general. But that is not the meaning of the word as used in the *Smritis*. To illustrate the primary meaning of the word “कन्या” virgin, the learned author of the *Sardakalpadruma* has cited a significant passage from the *Vanaparva* in the Mahabharata, showing the root and inflexion of the word and its meaning *kumari*,—“कुमारी.” He gives the secondary meaning “woman” (नारी), following the earlier lexicographers. Sir Greaves Haughton in his dictionary confines the meaning to a “maid, a virgin, a young woman.” In fact there can be no doubt as to the meaning of the word as used in earlier Sanskrit literature and law. The *genus* (woman) for the *species* (virgin) is of later use.

I have not been able to find the word used in its wider sense any where in Manu. The word “दुहितृ” means daughter, married, unmarried or widow. All female children are

daughters “दुहितृ”. The word included in its significance, “कन्या”, and the lexicographers, I have referred to, are unanimous in this respect. Amar Singh, Hem Chandra as well as the *Melini*, also give the wider meaning of the word “कन्या”, but they do not give the synonym to be “दुहितृ”; they use the word “woman” (नारी). When Jimutavahana uses the words “सपत्नी दुहिता ब्राह्मणी कन्या” in paragraph 16, he must have used the word “दुहितृ” in its appropriate sense of daughter and the word “कन्या” as included in the genus “दुहितृ.” The word “कन्या” occurs also in paragraphs 6 and 7 of the same chapter and section. In paragraph 6, the text of Devala is cited—“सामान्यं पुत्रकन्यानां सतायां स्त्रीयनं स्त्रियाम्” and in paragraph 7 the word is interpreted to mean, as it must, “कुमारी.” In both the paragraphs Colebrooke’s translation of the words is “unmarried daughter.” I am not disposed to come to the conclusion that the same word was used by Manu and Jimutavahana in an unusual sense in Chapter IX, v. 198 and paragraph 16, respectively. Such use would be inconsistent with its use in other parts of their great works.

Of the commentators on Manu’s text, Kulluka carries the greatest weight. He seems to be of opinion that unmarried daughter first succeeds and, on her default, the sons of the deceased. He lays down distinctly that in the presence of both an unmarried daughter and sons, the former should be preferred and the sons follow the maiden daughter. This seems to be also the opinion of Manu’s commentators, Raghavananda, Nandan and Ram Chandra, but Sarvajna Narayan may appear to be of a different opinion. The latter says “कन्यति दुहितृ साक्षरम्,” i.e., the word *kanya* is used for daughters generally. But Sarvajna Narayan’s authority has never been recognised in Bengal as superior to Kulluka’s and the sentence itself is very vague.

The commentators of Dayabhaga, Srinatha, Ram Chandra, Moheswara, Achyutananda, Raghunandana and Srikrishna, interpreted the word “कन्या” in the text as having its ordinary meaning of unmarried daughter. Srikrishna is abundantly

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clear in his commentary as has been pointed out by Brett and Coxe, JJ. Srikrishna and Raghunandana subsequently laid down in their respective treatises a different rule of succession, as if the word “*कन्यः*” might mean daughters generally. In a conflict of authorities, however, Jimutavahana must be preferred. The later opinions of Srikrishna and Raghunandana, which are not based on the text of the Dayabhaga, ought not to be followed by the Courts in Bengal.

Macnaghten (Principles of Hindu Law, pp. 39-40), Strange (Vol. I, p. 251 and Vol. II, p. 403), Shyama Charan Vyavastha Darpana, p. 806, 1st Edition; pp. 717-8, 2nd Edition) and Elberling have followed Srikrishna's commentary on the Dayabhaga and not his individual opinion as given in the Dayakrama Sangraha. The order of succession—maiden daughter, son and other daughters—was accepted by all Anglo-Indian text writers, until a cloud was thrown in the third edition of Shyama Charan's Vyavastha Darpana published after his death. Sir Gooroo Dass Banerjee in his learned work on the Hindu Law of Marriage and Stridhan (p. 408, 2nd Edition) seems to be of opinion that Srikrishna did not follow Jimutavahana as regards succession to *pitridatta stridhana*. Raghunandana in his *Dayataluca* did not also follow the Dayabhaga.

I am of opinion that we should follow the Dayabhaga and not Srikrishna and Raghunandana, when it is evident that the latter have not followed their master in giving preference to daughters generally. I am confirmed in my view by what Rampini and Mookerjee JJ. have said in *Ram Gopal Bhutta-charjee v. Narain Chandra Bandopadhyaya* (1). I agree, therefore, with Brett J.

The result is that the appeals will be decreed with costs in all the Courts.

Appeals allowed.

(1) (1905) I. L. R. 33 Calc. 315; 10 C. W. N. 510; 3 C. L. J. 15.
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APPELLATE CIVIL.

Before Mr. Justice Caspersz and Mr. Justice Coxe.

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Chota Nagpore Landlord and Tenant Procedure Act (Bengal Act I of 1879), as amended by Bengal Act V of 1903, ss. 44A, 62, 66, 67 and 77—Previous suit for rent, struck off under section 62—Whether subsequent suit within six months maintainable.

Held by Caspersz J. Section 62 of the Chota Nagpore Landlord and Tenant Procedure Act is not controlled by section 44A of the said Act. When a rent suit is dismissed under the first clause of section 77, read with section 62, of the Act, another suit for the same rent is maintainable within the period of six months.

Held by Coxe J., that such a suit is not maintainable by virtue of section 44A of the Act.

SECOND APPEALS by the defendants, Karma Uraon and others.

These appeals arose out of two rent suits brought by the plaintiff for recovery of arrears of rent against the defendants under the Chota Nagpore Landlord and Tenant Procedure Act. It appeared that the 18th of May 1906 was fixed for the hearing of the said suits for rent. On that day the plaintiff being absent, the Deputy Collector struck off the suits under s. 62 of the said Act. The plaintiff on the same day applied for the restoration of the suits,* but the application was rejected. He then in June 1906 instituted fresh suits for rent.

Defence *inter alia* was that the suits could not proceed, inasmuch as they had been instituted within six months of the previous suits in contravention of the provisions of s. 44A of Bengal Act I of 1879.

The Court of first instance having held that the suits were barred by the provisions of section 44A of the Act, dismissed.

*Appeals from Appellate Orders Nos. 228 and 238 of 1907, against the order of W. H. Vincent, Judicial Commissioner of Chota Nagpur, dated April 9, 1907, reversing the order of Moulvi Mahomed Hamid, Deputy Collector of Ranchi, dated Nov. 16, 1906.

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the suits. On appeal the learned Judicial Commissioner reversed the decision of the first Court.

Against this decision the defendants appealed to the High Court.

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Babu Jogesh Chandra Dey, for the appellant. The suits are barred by s. 44 A. which was added by the amending Act (V of 1903). Section 62 of the Act is controlled by s. 44 A. The words "shall not institute another suit . . . recovery of any rent" in that section are wide enough to include cases falling under section 62. The order of the 18th May was really an order under the last part of section 77, as plaintiff admitted that he was present. The plaintiff should have pursued the remedies prescribed in sections 66 and 67, and by way of review. At any rate the suit for rent of 1962 could not be maintained.

Babu Nalini Ranjan Chatterjee, for the respondent. Section 44A does not apply to a case like the present. The suit was struck off. The parties are therefore restored to their original position. In any case section 62 controls section 44 A. It comes after section 44A, and the only bar imposed is the bar of limitation. Section 62 was left untouched: it was not made subject to the provisions of section 44A, when the latter section was added. The order "struck off" passed on the 18th of May was the correct order. The Court did not accept the plaintiff's statement that he was present.

Babu Jogesh Chandra Dey, in reply.

Cur. adv. vult.

CASPERSZ J. In these second appeals by the defendants the substantial question raised is whether the plaintiff's suits to recover arrears of rent for the Sambat years 1960, 1961, 1962 should have been dismissed as being in contravention of the provisions of section 44A of the Chota Nagpur Landlord and Tenant Procedure Act, 1879. Section 44A, which was added by Bengal Act V of 1903, runs thus:—"Where a landlord has instituted a suit, or applied for a certificate

under section 155 against a raiyat or a Mundari Khunt-kattidar for the recovery of any rent of his tenancy, the landlord shall not institute another suit or apply for another such certificate against him for the recovery of any rent of that tenancy until after six months from the date of the institution or making of the previous suit or application."

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It appears that the plaintiff in March 1906 sued for the rents of 1959 to 1961, and alleged that some rent for 1962 had been deposited by the defendants. Issues were framed, and the 18th May 1906 was fixed for hearing. On that day the Deputy Collector recorded the order. "Plaintiff absent, struck off, section 62 C. N. T. A." The same day the plaintiff applied for restoration and asserted that he and the defendants had been present at the time of hearing, but the Deputy Collector declined to accede to the application. The plaintiff, then, in June 1906, without waiting for the expiration of the period of six months mentioned in section 44A, instituted the fresh suits giving rise to the present appeals. Thereupon, the Deputy Collector held the suits to be barred by the provisions of the section, but on appeal the Judicial Commissioner has held that the suits were not barred.

The contentions raised by the learned vakil for the appellant defendants are these :—

(1) That the second suits were barred by section 44A of the Act. (2) That the order of the 18th May 1906, under section 62, was in error, and that it was in reality an order under the second clause of section 77 (3) That the plaintiff should have pursued his other remedies under sections 66, 67 of the Act and by way of review. (4) That at any rate, the fresh suits for the arrears of 1962 were incompetent.

There is no substance in the second, third and fourth contention. The second clause of section 77 provides that—"If on any such day, one only of the parties appears, the issue may be tried and determined in the absence of the other party, upon such proof as may be then before the Court." But no issue was tried and determined by the Deputy Collector on the 18th May 1906; the orders striking off the suits were appro-

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priately passed under the first clause of section 77 read with section 62. Consequently, the only remedy open to the plaintiff was to proceed by way of fresh suits, and if those suits were maintainable, he could properly include in his claim all arrears of rent then accrued due.

The only substantial question, therefore, is that embodied in the first contention, and it is narrowed to this. Whether section 62 is controlled by section 44A. I think not.

Section 62 provides that, "If on the day fixed by the summons or proclamation for the appearance of the defendant, or on any subsequent day to which the hearing of the case may be postponed prior to the recording of an issue for trial as hereinafter provided, neither of the parties appear in person or by an agent, the case shall be struck off, with liberty to the plaintiff to bring a fresh suit, unless precluded by the provisions for the limitation of suits contained in this Act."

The plaintiff was at liberty, on the 18th May 1906, in terms of section 62, to bring fresh suits, unless precluded by the provisions for the limitation of suits contained in this Act. Those provisions are contained in sections 42, 45 and not, in my opinion, in section 44A. The period of limitation means the period during which action may be taken. Section 44A refers to a period during which action cannot be taken, and such a restrictive section is not covered by the general rule laid down by section 4 of the Limitation Act. In my opinion, section 44A restricts the Court's jurisdiction rather than the plaintiff's right of suit; the latter exists though it is in abeyance for six months.

Section 44A must also be construed strictly, that is, in favour of the plaintiff, because it encroached on his ordinary right to sue for arrears of rent. It may be assumed that the Legislature is acquainted with the actual state of the law. When Bengal Act V of 1903 added section 44A to Bengal Act I of 1879 the provisions of section 62 were left untouched. The Legislature did not insert, nor can I insert in section 44A the words "notwithstanding anything contained in section 2." The plain meaning of section 44A is that, when a land-

lord has instituted a suit for the recovery of any rent, he shall not institute another suit for the recovery of any rent subsequently accrued due until after six months from the date of the institution of the first suit. For example, if a tenant pays his annual rent in 12 or 4 instalments, the landlord cannot sue him every month or even every quarter; he must wait for at least six months. The words "any rent" which occur twice in section 44 A must be literally interpreted to refer, respectively, to any rent covered by the previous suit and any rent covered by the second suit and, *ex natura rei* the subject matter of the respective suits must be different, otherwise the second suit would not be necessary or maintainable. It is only in the case of a fresh suit, which the plaintiff is permitted by section 62 to bring, that the rent arrears claimed may be the same as in the suit struck off. The words "struck off" mean that the suit has, and never had, any existence; they imply that the suit is withdrawn as in section 373 of the Civil Procedure Code, and in this connection, may be cited the analogous section (147) of the Bengal Tenancy Act. See also *Varajlal Bhaishankar Selat v. Shomeshwar* (1).

The appeals must therefore fail and are dismissed with costs

COXE J. The only question that arises in this case is whether, when a rent suit is dismissed under section 62, or the first clause of section 77 of Bengal Act I of 1879, another suit can be instituted for the same rent within the period of six months. It is conceded that, if the first suit is dismissed under any other section, the second suit will not lie.

I am inclined to agree that section 44A is not a provision for the limitation of suits "within the meaning of section 62." Of course, if the law requires a suit to be brought after one specified date and before another date, both dates are really limits of the period within which the suit may be instituted; and a provision of law, which fixes the first date, really limits

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(1) (1904) I. L. R. 29 Bom. 219, 225.

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the suit just as much as the provision that fixes the second date. But the word "limitation" has acquired by custom a technical meaning, and I have little doubt that the Legislative authorities in framing section 62 intended only to refer to the latest date by which a suit might be instituted.

But it appears to me that the terms of section 44A taken in their ordinary meaning bar this suit. The words are "when a landlord has instituted a suit for the recovery of *any* rent * * * he shall not institute another suit for the recovery of *any* rent." Here it cannot be denied that the plaintiff did institute a suit for rent in March 1906, and did institute another suit for rent in June 1906. It has been argued that the effect of striking off a suit under section 62 is to restore the parties to their original positions as if such a suit had never been instituted. But to me it seems impossible to say in such a case that the first suit has never been instituted at all. And that the second suit is a new suit and not a continuation of the first suit is clear from the provision of limitation.

An Act ought to be construed so as to give as far as possible their full meaning to all its provisions. Here, if section 44A is construed against the landlord, it does not really conflict with section 62. The landlord's right of suit established by section 62, is not abolished by being kept in abeyance or six months. On the other hand, if section 44A is construed against the tenant, it seems to me that so far as regards suits of this nature, the plain words of the section are over-ridden, as the landlord, having instituted a suit for rent, is again allowed to bring another suit for rent.

In this suit the landlord sues both for the rent claimed in the former suit and for the rent of subsequent years. Indeed he must do so on pain of losing the latter rent altogether, *Taruck Chunder Mookerjee v. Panchu Mohini Debya* (1). But, unless the effect of an order under section 62 is an entire obliteration of the suit altogether, which I do not consider

admissible, it would seem that the suit at any rate for the rent of the subsequent year must be barred by section 44A.

The learned Judicial Commissioner has laid some stress on the point that section 44A is intended to save tenants from being harassed, and that, if a case is struck off under section 62, the defendant cannot be said to be harassed at all. But this observation hardly applies to the first of the present cases, in which issues were framed and the defendant must therefore have been forced to attend at some time or other in the course of the proceedings.

Finally there is the analogy of section 147 of the Bengal Tenancy Act, 1885. That section (which deals with precisely the same matter as section 44A now under consideration) though made specifically subject to section 373 of the Civil Procedure Code is not made subject to section 99. The natural inference is that the Legislature did not intend suits revived under section 99 to be free from the restrictions of section 147. And, if this was the intention of the Legislature in 1885, it would seem probable that the same intention would prevail when section 44A was enacted long afterwards to deal with an exactly similar matter.

Accordingly, I think that the suit is barred by section 44A, but as the landlord, from the point of view of justice and common sense, is certainly entitled to succeed, I do not desire to insist on the point of law, and I agree to the appeals being dismissed under section 575 of the Civil Procedure Code and not referred to another Judge.

Appeals dismissed.

S. C.

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APPELLATE CIVIL.

Before Mr. Justice Caspersz and Mr. Justice Coxe.

BEPIN BEHARY SHAHA

v.

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Nov. 18.

Transfer of Property Act (IV of 1882) s. 93—Right to redeem, after the time allowed—Court accepting money before the order absolute—Such acceptance, effect of.

A person, who does not deposit the redemption money within the time allowed, can redeem afterwards, before a final order is made under section 93 of the Transfer of Property Act.

APPEAL by the plaintiff (opposite party), Bepin Behary Shaha.

A decree was passed by the Subordinate Judge of Suri in a contested suit, in which the plaintiff sued to enforce his mortgage on certain property by sale, as also to redeem certain prior encumbrances, on the 31st May 1906, allowing the plaintiff to redeem the prior mortgages within six months from the date of the decree. The defendants, who were the prior mortgagees, appealed against the said decree, and the appeal was dismissed. On the 16th April 1907, the plaintiff deposited the money due under the prior mortgages. On the 14th May 1907 the Court recorded the following order:—

“The plaintiff has deposited the money due to the 1st and 2nd mortgagees as directed in the decree. He now prays that the mortgaged properties be sold free of the prior charges for recovery of the money due to the plaintiff on account of his own mortgage money together with the amounts deposited by him to redeem the prior charges. The pleader of the other parties has declined to appear. I accordingly order that the prior charges of defendants 2, 3 and 4 be hereby declared redeemed and that the mortgaged properties be free of the said mortgages as prayed for.”

The plaintiff then applied to make the decree absolute and a notice was issued upon the defendants to shew cause on the 12th July 1907, why the decree should not be made absolute.

* Appeal from Appellate Order No. 70 of 1908, against the order of K. N. Roy, District Judge of Beerbhoom, dated Nov. 25, 1907, reversing the order of Umesh Chandra Sen, Subordinate Judge of Beerbhoom, dated July 27, 1907.

In the meantime, on the 14th June 1907 the defendants Nos. 3 and 4 applied for reconsideration of the order of the 14th May 1907. The plaintiff opposed the application on the grounds that the order for redemption having been once passed could not be set aside on this petition and that he was entitled to deposit the decretal amount within six months from the date of the final decree, that is, the date of the decree of the Appellate Court. The learned Subordinate Judge gave effect to these objections and rejected the petition for reconsideration by the defendants on the 27th July 1907. Against this order the defendants (objectors) appealed to the learned District Judge, who set aside the decision of the Court of first instance.

The plaintiff (opposite party) then preferred this appeal to the High Court.

Babu Nil Madhab Bose (*Babu Hari Bhusan Mookerjee*, with him) for the appellant. The question is, whether a person can redeem a mortgage after the period of grace allowed by the law, and before an order absolute is made. I submit he can. In the present case the Court accepted the money with notice to the opposite party. Section 93 of the Transfer of Property Act clearly shows that the plaintiff's right to redeem exists until such right is extinguished by an order absolute. The cases of *Nandram v. Babaji* (1), *Sitaram v. Madholal* (2), *Somesh v. Ram Krishna Chowdhry* (3), *Poresk Nath Mojumdar v. Ram Jodu Mojumdar* (4) and *Vedapuratti v. Vallabha Valiya Raja* (5) support my contention. The Court has ample jurisdiction to extend the time, and in this case did so.

Babu Nalini Ranjan Chatterjee, for the respondent. The case of *Vedapuratti v. Vallabha Valiya Raja* (5) lays down, where a suit for redemption has been instituted and a decree for redemption has been passed therein, but not executed, a subsequent suit is not maintainable for the redemption of the same mort-

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(1) (1897) I. L. R. 22 Bom. 771.

(3) (1900) I. L. R. 27 Calc. 705.

(2) (1901) I. L. R. 24 All 44.

(4) (1889) I. L. R. 16 Calc. 246.

(5) (1901) I. L. R. 25 Mad. 300.

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gage. If a second suit for redemption is barred, the question still remains whether even after the time allowed to redeem, the mortgagee can redeem. I submit he cannot. The Calcutta cases cited by the other side are all cases in foreclosure suits. In a suit for foreclosure time can be enlarged; but in a suit for redemption it cannot be done—see *Novosielaski v. Wakefield* (1). It can only be done, if the application is made before the expiration of time granted to redeem. In the present case no such application was made. In the case of *Ramlal v. Tulsa Kuar* (2) it has been held that in a case of decree for redemption of foreclosure no extension of the time limited by the decree for payment of the decretal amount can be made except for good cause shown; and that case dissents from the case of *Poresb Nath Mojumdar v. Ram Jodu Mojumdar* (3). Section 93 of the Transfer of Property Act says that the Court may postpone the date fixed for payment, upon good cause shown. It clearly shows that it can only be done before the expiration of the time. It is not a case governed by the Transfer of Property Act. The rights of the parties must be decided by the decree made in the suit. The present case is covered by the case of *Faijuddi Sardar v. Asimuddi Biswas* (4), in which it has been held that a party has no right to deposit money after expiry of the time allowed. If the proposition of law laid down in that case is not accepted, the present case should be referred to the Full Bench.

Babu Nil Madhab Bose, in reply.

Cur. adv. vult.

CASPERSZ AND COXE JJ. This appeal arises out of a composite suit, in which the plaintiff sued to enforce his mortgage on certain property by sale, as, also, to redeem certain prior encumbrances. The suit was decreed and the plaintiff was directed to deposit the amount due with respect to the prior encumbrances within six months, and it was ordered

(1) (1811) 17 Ves. 417.

(3) (1889) I. L. R. 16 Calc. 246.

(2) (1896) I. L. R. 19 All. 180.

(4) (1907) 11 C. W. N. 679.

that, if he did not do so, he should not be able to redeem. The decree was dated the 31st May 1906. An appeal was lodged by the defendants or some of them, but it was dismissed on some date, which does not appear on the papers and on the 16th April 1907, the plaintiff deposited the money, and asked that the property covered by the mortgage might be sold free of encumbrances, the prior mortgages having been redeemed by the deposit of the money due upon them. The pleader of one of the prior encumbrancers (not the present appellant) was sent for, but declined to appear, and the application was granted on the 14th May 1907.

Thereafter the plaintiff applied to have the decree made absolute. This application was contested by the prior encumbrancers, though it can hardly have had any reference to them, inasmuch as the only relief in the nature of an "order absolute" that can be given to the plaintiff in a suit for redemption is that he "shall, if necessary, be put in possession of the mortgaged property." Here, this was not necessary and the only order that could be made absolute was the order for sale, to which, if their encumbrances had been redeemed by the order of the 14th May 1907, they could not object. They, however, also asked that the order for sale and redemption should be set aside. The Subordinate Judge refused both prayers, made the decree absolute, and confirmed the order for sale and redemption. The learned District Judge set aside these orders. The plaintiff appeals, and it is urged that, in the circumstances we have stated, the orders of the First Court were wrongly set aside by the District Judge.

It appears that the defendant No. 3, respondent, purchased the property in execution of a first mortgagee's decree upon his mortgage. He has a further claim on the property, inasmuch as he also redeemed the mortgage of a second mortgagee, the plaintiff being the third mortgagee. The question is, whether the defendant No. 3 being a purchaser in execution of the decree on a prior mortgage and in possession of the property, section 93 of the Transfer of Property Act, 1882, has any application to his case. It is also urged on his behalf that, if the section

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does apply, still the fact that the plaintiff did not deposit the redemption money within six months precludes him from obtaining any benefit now from the decree for redemption.

Section 93 does not, of course, in its literal terms, apply to a case like the present, where there is no prior mortgage still in existence, but the encumbrancer is a purchaser in possession. But we think that the principles laid down in the section ought certainly to be followed in dealing with a case of this nature. It is well settled that, when a mortgagee sues on his mortgage, and, in disregard of section 85, does not make a subsequent mortgagee a party, that mortgagee is entitled to redeem the property in the hands of a purchaser in execution. There is no reason why such a purchaser should be in a better position with respect to redemption than the mortgagee under whose decree he has purchased. There are no other sections in the Transfer of Property Act dealing with redemption, except sections 91-95. In these circumstances, we are of opinion, that we should be guided by those sections in dealing with the case, whether it is covered by their precise terms or not.

Turning now to the question whether a plaintiff, who does not deposit the redemption money within the time allowed, can redeem afterwards, before a final order is made under the section, or as it is usually expressed, before the decree is made absolute, we find considerable diversity of judicial opinion. The sections, however, seem to us to indicate the intentions of the Legislature with reasonable clearness.

Section 92 requires the decree to lay down that, if the plaintiff pays within a fixed time, the defendant shall retransfer the property to him, and, if he does not pay, he shall be debarred from redeeming (unless the mortgage is simple or usufructuary), or else the property shall be sold (unless the mortgage is by conditional sale). The words in brackets show that the section does not literally apply to the present case. But, applying it as nearly as we can, we think that the position of the defendant No. 3, who is in possession of the property under an obligation to retransfer it, if the money is paid

on a fixed date, is far more analogous to that of a mortgagee by conditional sale, than to that of the holder of any other form of mortgage described in the Transfer of Property Act. The decree framed gave effect to this position, inasmuch as it directed that, if the plaintiff did not deposit the money by the fixed date, he should be debarred from redeeming.

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Section 93 lays down what is to happen in the two contingencies of the money being paid and not being paid. In the latter, the defendant is permitted, in the case of a mortgage by conditional sale, to apply for an order that the plaintiff be debarred from redeeming. And the section goes on to prescribe that "on the passing of any order under this section the plaintiff's right to redeem shall be extinguished." It appears to us that this expression clearly indicates that the right to redeem continues till the order has been passed. If this were not so, it is impossible to understand for what reason a mortgagee, other than one whose mortgage was simple or usufructuary, should be specifically allowed to apply for an order to debar the plaintiff from redeeming. If the plaintiff cannot redeem after the fixed period, unless the mortgagee himself takes some action, as has been argued by the learned pleader for the respondents, it is evident that his right is altogether gone. The mortgagee is not likely to take any action, when he is already in possession of the property, in order to enable the plaintiff to exercise his right of redemption. To quote the words of the learned Chief Justice in *Vedapuratti v. Vailabha Valiya Raja* (1). "On the construction of sections 92 and 93 of the Transfer of Property Act it is perfectly clear that the equity of redemption remains unforclosed, and the relation of mortgagor and mortgagee continues, until the order absolute, which is contemplated by section 93, is made * * * * *. If the right to redeem is only extinguished when an order is made under section 93, it follows that the right is a subsisting right until the order is made." It appears to us that the Legislature intended that the defendant, if he seeks to have the plain-

(1) (1901) I. L. R. 25 Mad. 300.

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tiff's rights finally extinguished, should apply for an order to that effect, and that, if he does not do so, the right should remain in existence.

These views derive considerable support from the Madras case already cited, and from two cases decided in Bombay and Calcutta, respectively. The Bombay case of *Nandram v. Babaji* (1) was cited with approval in Madras (2) and is clear authority for the proposition that a mortgagor can apply for extension of the time for redemption after the period of grace has elapsed, but before a final order has been made under section 93. If that view is correct, it would seem, that if a deposit is accepted by the Court before the final order, but after the date fixed for payment, it becomes an effectual deposit. It makes little or no practical difference whether the acceptance of such a deposit is or is not preceded by a formal order extending the time. It is the acceptance of the deposit that is the really important matter, and, if the Court accepts a deposit after the due time has elapsed, it must be assumed, in the absence of anything to the contrary, that the Court is satisfied that there has been good cause for the delay. In the present case it is reasonable to suppose that the Court thought it natural that the plaintiff should have hesitated to pay in a large sum of money, while the fate of his decree was still uncertain, owing to the appeal lodged by the other side. The Court sent for the pleader of the principal defendant and made the order after he had declined to come. All the probabilities point to the fact that the Court saw fit to condone the plaintiff's delay, and that being so, we think that the deposit must be regarded as being in time and upon application made to extend the original period fixed for payment.

The decision of this Court, to which we have referred, considered section 87 rather than the effect of section 93, but it is clearly applicable in principle:—see *Poresh Nath Mojumdar v. Ramjodu Mojumdar* (3), where the learned Judges

(1) (1897) I. L. R. 22 Bom. 771. (2) (1902) I. L. R. 25 Mad. 300,

(3) (1889) I. L. R. 16 Calc. 246, 249.

remark :—" It seems quite clear to us that the fact of the Legislature having made this provision, requiring an order absolute to be made, makes the earlier order simply an order *nisi* and the mortgagor can at any time, until the order absolute is made, redeem his property."

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Reference may also be made to *Debi Prasad v. Jai Karan Singh* (1), in which the earlier case of *Ram Lall v. Tulsa Kuar* (2), which is to some extent in favour of the respondents, was not followed.

The learned pleader for the respondents relies principally on two cases, namely, *Vallabha Valiya Raja v. Vedapuratti* (3) and *Faijuddi Sardar v. Asimuddi Biswas* (4). But the authority of the first of these cases has been much weakened by the case reported in the 25th volume, already quoted, and in the words of the learned Chief Justice, in the latter case " can not be put higher than that the learned Judges dealt with the case before them upon the assumption that a second suit would lie and that * * * the mortgagee * * * is not without a remedy."

Finally all that was decided in *Faijuddi Sardar v. Asimuddi Biswas* (4) was that the period of grace runs from the date of the original decree and not from that of the appellate decree. The point whether the plaintiff could redeem after the fixed date was not raised, nor does it appear certain whether or not any final order had been made on the application of the defendant.

In these circumstances, we think that the decision of the District Judge must be set aside and that of the Subordinate Judge restored. The appeal is accordingly allowed with all costs.

Appeal allowed.

(1) (1902) I. L. R. 24 All. 479.

(3) (1895) I. L. R. 19 Mad. 40.

(2) (1896) I. L. R. 19 All. 180.

(4) (1907) 11 C. W. N. 679.

CIVIL RULE.

Before Mr. Justice Coxe and Mr. Justice Bell.

JAGADISH CHANDRA SHAHA

v.

KRIPA NATH SHAHA*.

1908

Aug. 10th.

Civil Procedure Code (Act XIV of 1882), ss. 295, 244, 622—Rateable distribution—Different judgment-debtors—Appeal against order under s. 295, if lies—Jurisdiction of High Court to interfere under s. 622.

An order under s. 295 of the Civil Procedure Code passed as between parties who are not the same as in the decree, in execution of which assets were realized under s. 295, is not a decree under s. 244, and no appeal lies against the order, and the order of the District Judge on appeal, setting aside the order of the Munsif, is without jurisdiction.

Held further, that when an order is wholly without jurisdiction, the High Court should interfere under s. 622.

Gonesh Das Bagria v. Shiva Lakshman Bhakat (1), not applicable. *Ramasamy Chettiar v. Orr* (2) followed. *Dayaram Jagjivan v. Govardhandas Dayaram* (3) distinguished.

Prosunno Kumar Sanjal v. Kalidas Sanjal (4) referred to.

CIVIL RULE granted to Jagadish Chandra Shaha.

The petitioner and his minor brother, represented by his mother and guardian, instituted a suit for the recovery of money against one Sree Charan Pal and three others—Raghu Nath, Baikuntha Nath and Krishna Nath Pal in the Court of the 1st Munsif of Dacca and attached before judgment some moveable properties belonging to the said four judgment-debtors and obtained a decree against them.

Thereafter some persons other than Kripa Nath Shaha, Sanatan Shaha and others, who had obtained a decree against the same four judgment debtors and the said Kripa Nath, Sanatan and others, (of whom, some had obtained decrees

* Civil Rule No. 2310 of 1908, against the order of E. J. Drake-Brockman, District Judge of Dacca, dated 16th May 1908, reversing the order of the 1st Munsif of Dacca, dated 21st March 1908.

(1) (1903) I. L. R. 30 Calc. 583.

(3) (1904) I. L. R. 28 Bom. 458.

(2) (1902) I. L. R. 26 Mad. 176.

(4) (1892) I. L. R. 19 Calc. 683 ;

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against Sree Charan Pal alone and some against Sree Charan Pal and one of the other three judgment-debtors), applied before the 1st Munsif of Dacca under section 295 of the Code of Civil Procedure for rateable distribution of the assets realized by the sale of moveable properties attached before judgment in execution of the decree obtained by this petitioner and his brother.

On the 21st March 1908, the 1st Munsif of Dacca rejected the application of Kripa Nath Shaha, Sanatan Shaha and the others, who had decrees, but not against all the judgment-debtors. They preferred an appeal against the order of the Munsif, making only the petitioner the respondent. On the 16th May the District Judge of Dacca decreed the appeal *ex parte*.

On the 27th May, the petitioner filed an application for the rehearing of the appeal, alleging, amongst other grounds, that, in consequence of the seal of the District Judge's Court having been affixed on the place on which the date of hearing was written in the notice served on the petitioner, the date was made indistinct.

The application being rejected, the application under section 622 was made to this Court.

Babu Upendra Lal Ray for the petitioner. No appeal lies from an order under section 295: *Gogaram v. Kartick Chunder Singh* (1), *Kashi Ram v. Mani Ram* (2). Section 588 is clear on the point. The order of the District Judge is therefore without jurisdiction. The Full Bench case of *Gonesh Das Bagria v. Shiva Lakshman Bhakat* (3) is inapplicable, that case referring to a regular suit. The order passed cannot be taken as one under section 244, the decrees being separate and the parties different: *Kashi Ram v. Mani Ram* (2).

Babu Sarat Chandra Basak for the opposite party. The order is under section 244 and is appealable: *Prosunno Kumar Sanyal v. Kali Das Sanyal* (4). The section should be liberally construed. The Full Bench case (3) is applicable. Ad-

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(1) (1868) 9 W. R. 514.

(2) (1892) I. L. R. 14 All. 210.

(3) (1903) I. L. R. 30 Calc. 583.

(4) (1892) I. L. R. 19 Calc. 683;
L. R. 19 I. A. 166.

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mitting that no appeal lay to the District Judge, the High Court should not interfere in such cases. The discretion under section 622 should be exercised very carefully and only when positive injustice has resulted.

COXE AND BELL JJ. In this case the petitioners obtained a decree against certain judgment-debtors. The opposite party had obtained a decree against certain judgment-debtors, who are not exactly identical with those of the petitioners, and had applied for rateable distribution. The Munsiff of Dacca re used this application on the ground that the judgment debtors were not identical. Against this order, the opposite party appealed to the District Judge; and the District Judge, following the decision in *Gonesh Das Bagria v. Shiva Lakshman Bhakul* (1), set aside the Munsiff's order and directed that the opposite party should share in the rateable distribution.

The petitioner has applied to this Court under section 622 of the Civil Procedure Code, and has obtained a Rule on the opposite party to show cause why the order of the District Judge should not be set aside on the ground that it was passed without jurisdiction.

It is clear that under section 588 of the Civil Procedure Code, an order passed under section 295 of the Civil Procedure Code is not ordinarily appealable; but it is argued on behalf of the opposite party that such an order comes within the scope of section 244 and is therefore open to appeal. Reference has been made to the case of *Prosunno Kumar Sanyal v. Kali Das Sanyal* (2), in which it was laid down that section 244 should be construed with liberality and that a question, which concerned an auction purchaser at an execution sale, was none the less a question coming within that section.

We cannot regard this case as an authority for holding the opposite party in this case, who is a decree-holder under a totally distinct decree, to be a party to the suit, in which the

(1) (1903) I. L. R. 30 Calc. 583.

(2) (1892) I. L. R. 19 Calc. 683;
L. R. 19 I. A. 166.

petitioner's decree was passed and entitled therefore to appeal by section 244 of the Code. We think that the order cannot possibly come within the scope of section 244 of the Civil Procedure Code; and that therefore no appeal lay to the District Judge.

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Secondly it is argued on behalf of the opposite party that, although no appeal lay to the District Judge, yet this Court should not set aside his order in the exercise of the discretion vested in it by section 622 of the Civil Procedure Code.

The learned pleader for the opposite party has not, however, been able to show us any case in this Court in which it refused to interfere with an order, which was passed wholly without jurisdiction. By the order of the Munsiff the petitioner obtained a right to execute his decree free from the interference of the opposite party. The order giving him this right may, or may not, have been just, but it cannot be set aside except in accordance with the law. The case of *Ramasamy Chettiar v. R. G. Orr* (1) is an authority for holding that in cases like the present the High Court is bound to interfere, and although in *Dayaram Jagjivan v. Govardhandas Dayaram* (2) the learned Judges refused to interfere under section 622 with an order passed without jurisdiction, yet their refusal was based on such special circumstances, as to be no authority to justify us in refusing to exercise the power, which section 622 gives us in a case like the present.

The result is that the Rule is made absolute and the order of the District Judge, dated the 16th May 1908, is set aside.

Rule absolute.

S. M.

(1) (1902) I. L. R. 26 Mad. 176.

(2) (1894) I. L. R. 28 Bom. 458.

ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

JYOTI PROKASH NANDI

v.

JHOWMULL JOHURRY*.

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Conspiracy—Auction sale—Fraud—Combination among bidders not to bid against each other—Cause of action—Fraud, allegations of, to be specifically pleaded.

A combination among bidders at an auction, not to bid against each other, even if the combination amounts to a "knock-out", does not give rise to an action at the suit of the vendor.

Ambica Prosad Singh v. R. H. Whitwell (1), *Fuller v. Abrahams* (2), *Levi v. Levi* (3), dissented from. *Doolubdass v. Ramall* (4), referred to.

Allegations of fraud must be specifically pleaded: general allegations however strong, are insufficient to amount to an averment of fraud of which any Court ought to take notice.

Wallingford v. Mutual Society (5), and *Gangai Narain Gupta v. Tiluckram Chowdhry* (6), followed.

ORIGINAL SUIT.

THIS suit was instituted by the plaintiff Jyoti Prakash Nandi and his infant brothers through their guardian, against the defendant Jhowmull Johurry and others to recover the sum of Rs. 42,000 as damages for forming a combination, alleged to be illegal, fraudulent and opposed to public policy, for the purpose of avoiding all competition at an auction of certain jewellery held at Burdwan on the 9th April, 1907.

The plaintiffs alleged that a sale by public auction to the highest bidder of certain jewels was advertised by them, to be held at Burdwan on the 8th April 1907 and on subsequent days. The auction was held, as advertised, on April 8th in the presence and under the supervision and control of Jyotiprakash and the guardian, and certain jewels and ornaments were sold. On the 9th and 10th April, similarly, auctions were held and

* Original Civil Suit No. 481 of 1907.

(1) (1907) 6 C. L. J. 111.

(2) (1821) 3 Brod. and B. 116.

(3) (1833) 6 Car. and P. 239.

(4) (1850) 15 Jur. 257.

(5) (1880) L. R. 5 A. C. 685, 697.

(6) (1888) I. L. R. 15 Calc. 533.

certain other jewels and ornaments were sold. It was with regard to the second day's sale, which realised the sum of Rs. 44,310, that the present suit was instituted (a second similar suit having been filed in respect of the third day's sale) the plaintiffs alleging that the auction of April 9th had been reduced to a nullity and the goods sold at a gross undervalue owing to an illegal and fraudulent combination effected by the defendants. It was alleged that a large number of the bidders at the auction held on April 8th, finding that the articles sold that day fetched a fair price on account of the competition among the bidders, conspired to form a combination of the intending purchasers at the subsequent days' sales not to bid against each other so as to avoid all competition and so to purchase the articles put up to auction at an undervalue.

They accordingly nominated 11 persons as a syndicate to represent the combination at the auction of April 9th, and it was agreed that the articles so purchased should be resold in Calcutta, and five members were nominated to form a *punch* to distribute the profits so secured amongst the members of the combination

The articles purchased on April 9th on behalf of the combination for the sum of Rs. 44,310, were subsequently resold in Calcutta, it was alleged, at a profit of Rs. 42,000. Disputes however arose amongst the members of the combination as to the distribution of the profits on the resale and the moneys were deposited in the Bank of Bengal in the names of the defendants Jhowmull Johurry and Chooni Lal.

The dissensions among the members of the combination eventually resulted in two suits being instituted by one of the members Hari Charan Kharad and in two rules being obtained by him against Jhowmull and Chooni Lal. At the hearing of these suits on June 12th, 1907, the plea was taken by the defendants, who were also defendants in the present suit, that the combination, out of which the profits accrued, was illegal and fraudulent and amounted to a criminal conspiracy, the intention being to nullify the auction and defraud the owners

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of the articles. These suits were, however, withdrawn before final determination and the matters in dispute were referred to arbitration.

It was alleged by the present plaintiffs that they first came to know of the existence of this conspiracy from an account that appeared in the newspapers on May 25th, 1907, of the application for the rules in the suits mentioned above, and thereupon the present suit was instituted.

In their written statements, the defendants admitted the formation of a combination among certain of the bidders at the auctions, and the nomination of the syndicate, but denied the allegations of fraud and conspiracy, or that the combination included all the purchasers at the auctions. They further denied that the auction purported to be to the highest bidder, and alleged that the owners had expressly reserved to themselves the right of refusing to sell even to the highest bidder and had reserved prices at an appraisalment fixed by professional jewellers.

Mr. B. C. Mitter (*Mr. Chakravarti* and *Mr. N. Sen* with him) for the plaintiffs. The combination among the defendants at the auction was illegal and fraudulent as it was for the purpose of avoiding all competition. There is a distinction between an honest combination among intending purchasers and dishonest concert for the suppression of all competition. It is the object, which determines whether a combination is lawful or otherwise. The object here having been to stifle an honest auction and so to obtain the articles at a sacrifice, the combination was fraudulent. See *Ambica Prasad Singh v. R. H. Whitwell* (1), *Gobindo Chandra Jha v. Shyam Lal Jha* (2) *Pran Nath Roy v. Khagendra Mahata* (3). [*Fletcher J.* referred to *Galton v. Emuss* (4).] This case is distinguishable from *Mogul Steamship Company v. McGregor Gow & Co.* (5), where it was found that both the object and the means employed were lawful. In the present case, the

(1) (1907) 6 C. L. J. 111.

(3) 1908) 12 C. W. N. clv.

(2) (1904) 1 C. L. J. 85.

(4) (1844) 1 Coll. C. C. 243.

(5) [1891] A. C. 25.

secrecy of the combination was a badge of fraud. Had the conspiracy come to the knowledge of the plaintiffs, they could have stopped the sale. A conspiracy to injure, resulting in damage, gives rise to civil liability. The profit of nearly 100 per cent., which the defendant secured on the resale, was the damage suffered by the plaintiffs. A conspiracy to injure—an oppressive combination—differs from an invasion of civil rights by a single individual. Certain kinds of conduct not criminal in any one individual may become criminal, if done by combination among several. See *Mogul Steamship Company v. McGregor Gow & Co.* (1), which was followed in *Giblan v. National Amalgamated Labourers, Union of Great Britain and Ireland* (2). See also *Quinn v. Leathem* (3), and *Lambton v. Mellish* (4). [*Fletcher J. Lambton v. Mellish* (4) was overruled by *Sadler v. Great Western Railway Co.* (5)].

Mr. H. D. Bose (*The Advocate-General*, Mr. Sinha and Mr. A. Chaudhuri with him) for some of the defendants. This suit is not maintainable: the plaint does not disclose any cause of action. An agreement between two or more persons not to bid against each other at an auction, even if amounting to a “knock-out” is not illegal and does not invalidate the sale. See *Halsbury’s Laws of England*, Vol. I., p. 512; *Encyclopædia of the Laws of England*, Vol. I, p. 414. See also *In re Carew’s State Act* (6), *Galton v. Emuss* (7), *Doolubdass v. Ramlall* (8), *Heffer v. Martyn* (9), *Gobind Chundra Gangopadhya v. Sherajunnissa Bibi* (10), *Doorga Singh v. Sheo Pershad Singh* (11), and *Hari Bal Krishna v. Naro Moreswar* (12).

[*Fletcher J.* How do you distinguish *Ambica Prasad Singh v. R. H. Whitwell* (13) and *Gobindo Chandra Jha v. Shyam Lal Jha* (14). These decisions appear to be contradictory to the decision in *Chandra Gangopadhya v. Sherajunnissa Bibi* (10)].

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(1) (1889) L. R. 23 Q. B. D. 598, 616.

(2) [903] 2 K. B. 600, 621.

(3) [1901] A. C. 495, 510.

(4) [1894] 3 Ch. 163.

(5) [1896] A. C. 450.

(6) (1858) 28 L. J. Ch. 218

(7) (1844) 1 Coll C. C. 243

(8) (1850) 15 Jur. 257.

(9) (1867) 36 L. J. Ch. 372.

(10) (1832) 13 C. L. R. 1.

(11) (1889) L. L. R. 16 Cal. 194, 199.

(12) (1893) L. L. R. 18 Bom. 342.

(13) (1907) 6 C. L. J. 111.

(14) (1904) 1 C. L. J. 85.

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The decisions in those two cases were based on *Levi v. Levi* (1) and *Fuller v. Abrahams* (2), both of which cases are now considered bad law : besides, those cases referred to auctions by the Court and the *dicta* relied on are *obiter*. *Doolubdass v. Ram-lall* (3), a Privy Council case, is conclusive on the subject. See also *Mahomed Meera Ravuthar v. Savvasi Vijaya Raghunadha Gopalar* (4). Assuming the object of the combination to have been to obtain the articles at the cheapest price, this in itself was not a ground of fraud. There was no malicious intention to injure the owners. The present case falls within the authority of *Mogul Steamship Company v. McGregor Gow & Co.* (5). It is only if a combination be actuated by a malicious intention to spite and injure another without just cause that it becomes actionable. See *Denaby and Cadeby Main Collieries Limited v. Yorkshire Miners Association* (6).

Mr. B. C. Mitter, in reply. The following authorities relied on by the defendants, *Galton v. Emuss* (7), *In re Carew's Estate Act* (8), *Heffer v. Martin* (9), were all cases of an agreement between two persons not to bid against each other, and therefore to be distinguished. Such a combination is not oppressive and would not be fraudulent *Gobindo Chandra Gongopadhya v. Sherajunnissa Bibi* (10) was a case under the Revenue Sale Laws, which are stringent.

Cur. adv. vult.

FLETCHER J. This is a suit brought by the plaintiffs against the defendants to recover damages for a conspiracy in forming a combination of all intending bidders to avoid all competition at an auction of certain jewellery held at Burdwan on the 9th April 1907.

The plaint alleges that the combination was "illegal and fraudulent," "an artifice" and so forth.

(1) (1833) 6 Car. and P. 239.

(2) (1821) 3 Brod. and B. 116.

(3) (1850) 15 Jur. 257.

(4) (1899) L. R. 27 I. A. 17.

(5) [1891] A. C. 25.

(6) [1906] A. C. 384, 400.

(7) (1844) 1 Coll. C. C. 243.

(8) (1858) 28 L. J. Ch. 218.

(9) (1867) 36 L. J. Ch. 372.

(10) (1882) 13 C. L. R. 1.

The question has first been argued before me whether or not the plaint discloses a cause of action.

Now it is an acknowledged rule of pleading that allegations of fraud must be specific.

“ With regard to fraud if there be any principle which is perfectly well settled it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud, of which any Court ought to take notice.” See *Wallingford v. Mutual Society* (1).

The present case is really governed by the decision of the Judicial Committee in *Gunga Narain Gupta v. Tiluckram Chowdhury* (2). Take the test applied by their Lordships in that case and apply it to the present, by striking out from the plaint in the present suit the words “ illegal and fraudulent,” “ artifice ” and so forth. And what remain ? Nothing, except certain allegations of fact that may be quite innocent. But then it is said on behalf of the plaintiffs that having regard to the decision of this Court by Mookerjee and Holmwood JJ. in *Ambica Prosad Singh v. R. H. Whitwell* (3) the plaint in the present case does disclose a cause of action.

The learned Judges in that case appear to have held that, if the object of the combination is to make a fair bargain, it is lawful, but if the object is to obtain the property at a sacrifice, it is unlawful. The learned Judges place reliance for their decision on two English authorities, *Fuller v. Abrahams* (4) and *Levi v. Levi* (5) and on several American cases and on the statement in an American text book (Greenhood on the Doctrine of Public Policy). The case of *Levi v. Levi* (5) was however only a ruling at *nisi prius* and has been dissented from by the Judicial Committee in *Doolubdass v. Ramlall* (6).

The case of *Fuller v. Abraham* (4) seems to stand alone amongst English cases and the Court in that case in discharg-

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(1) (1880) L. R. 5 A. C. 685, 697.

(2) (1888) I. L. R. 15 Calc. 533.

(3) (1907) 6 C. L. J. 111.

(4) (1821) 3 Brod and B. 116.

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ing the rule *nisi* for a new trial did not give the grounds of their decision. With regard to the American cases cited by the learned Judges in *Ambica Prosad Singh v. R. H. Whitwell* (1). I am not competent to express any opinion. But with regard to the statement from Greenhood's Doctrine of Public Policy, cited by the learned Judges, I may point out that the opinion expressed by that learned author is not in keeping with the opinion expressed in a recent work of a very distinguished lawyer. I refer to Volume I of the Laws of England by the Earl of Halsbury. In that volume at page 512 the noble and learned Earl expresses the opinion that the fact that a combination amongst bidders has been formed to bid at an auction, even if the combination amounts to what is commonly known as a "knock-out", does not give rise to an action at the suit of the vendor. The decision of the learned Judges in *Ambica Prosad Singh v. Whitwell* (1) does not touch the point as to whether without specific allegations of fraud the plaint discloses a good cause of action. In this respect it is sufficient for me to rest my judgment on the decision of the Judicial Committee in *Gunga Narain Gupta v. Tiluckram Chowdhry* (2), the facts in which case are practically on all fours with the present.

Accordingly I hold that the plaint does not disclose any cause of action. The plaint must therefore be rejected and taken off the file. The plaintiffs must pay to the defendants their costs of suit.

Suit dismissed.

Attorney for the plaintiffs : *B. S. Ghose.*

Attorneys for the defendants : *N. C. Bose, Manuel and Agarwalla.*

(1) (1907) 6 C. L. J. 111.

(2) (1888) I. L. R. 15 Calc. 533.

LETTERS PATENT APPEAL.

Before Hon'ble Mr. R. F. Rampini, Acting Chief Justice, and Mr. Justice Doss.

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Aug. 20.

Limitation—Distraint—Compensation, suit for—Illegal distress—Limitation Act (XV of 1877) Sch. II, Arts. 36, 39, 49—Tort—"Malfeasance"—"Trespass upon immoveable property."

Per RAMPINI, A. C. J. A suit for compensation for illegal distress, and cutting and carrying off standing crops is governed by Art. 36, Sch. II of the Limitation Act, such acts of tort constituting "malfeasance" within the terms of that Article.

Mohesh Chandra Das v. Hari Kar (1) approved. *Mangun Jha v. Dolhin Golab Koer* (2), distinguished.

Per Doss J. Wrongfully cutting and carting away crops amounts to "trespass upon immoveable property" and to "wrongfully taking specific moveable property" within the meaning of Arts. 39 and 49, Sch. II of the Limitation Act.; and a suit for compensation for such acts is governed partly by Art. 39 and partly by Art. 49 of the Act.

Mangun Jha v. Dolhin Golab Koer (2), referred to.

LETTERS PATENT APPEAL against the judgment of GEIDT J.

THIS appeal arose out of suits brought by the plaintiffs for compensation in respect of paddy grown on their respective lands, but seized and reaped at the instance of the defendant No. 1, who, after an unsuccessful litigation with the real landlord of these plaintiffs, caused to distrain the paddy, taking out an order from Court on the false allegation and application of a fictitious person as landlord, under whom a fictitious tenant was said to have grown the crop in suit.

The plaint was filed on the 25th of June 1903; and the wrongful distraint and cutting away of the crops took place in November or December 1900.

The defendants contended, *inter alia*, that the suit was barred by limitation, it having been instituted after a lapse

* Letters Patent Appeals Nos. 107 to 111 of 1906, in Appeal from Appellate Decrees Nos. 2208, 2663, 2664, 2665 and 2666 of 1904.

(1) (1905) 9 C. W. N. 376.

(2) (1898) I. L. R. 25 Calc. 692.

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of two years from the date of the alleged misappropriation of the crops.

The Court of first instance decreed the suit overruling the plea of limitation.

On appeal preferred by the defendants, the learned Subordinate Judge affirmed the judgment and decree of the first Court, and dismissed the appeal holding that Art. 39, Sch. II of the Limitation Act was applicable to the case.

The defendants appealed to the High Court.

The value of the subject matter of the suit being less than Rs. 1,000, the second appeal was heard by Mr. Justice Geidt sitting alone. His Lordship, relying on the case of *Mohesh Chandra Das v. Hari Kar* (1) was of opinion that Art. 36, Sch. II of the Limitation Act was applicable to the case and that, consequently, the suit was barred by limitation.

The plaintiff then preferred this appeal under s. 15 of the Letters Patent.

Babu Krishna Prasad Sarbadhikari, for the appellant.

Babu Jogesh Chunder Dey, for the respondent.

RAMPINI A. C. J. This is a Letters Patent appeal against a decision of Mr. Justice Geidt.

The appeal arises out of a suit for compensation for the illegal distress, and the cutting and carrying off of standing crops. Mr. Justice Geidt relying on the decision of this Court in *Mohesh Chandra Das v. Hari Kar* (1), has held that the Article of the Limitation Act applicable is Art. 36, and that the suit is accordingly barred as brought more than two years after the accrual of the cause of action.

On behalf of the plaintiff it has been contended that Mr. Justice Geidt's decision is wrong, and that the Article applicable is not Art. 36, but some other Article allowing 3 years for the suit and that the case relied on by Mr. Justice Geidt is

at variance with the Full Bench decision in *Mangun Jha v. Dolhin Golab Koer* (1).

I am unable, however, to see that Mr. Justice Geidt's judgment is wrong. I consider that the Article of the Schedule to the Limitation Act applicable is Art. 36. I have always been of this opinion :—see the Full Bench case above referred to and *Surat Lall Mandal v. Umar Haji* (2). The facts of the Full Bench case are different from those of the case of *Mohesh Chandra Das v. Hari Kar* (3). In the former case there seems to have been no illegal distress. In the latter case there was. Hence it does not appear that the decisions in the two cases are contradictory.

My learned brother considers that the Article of the Limitation Act applicable is partly Art. 39 and partly Art. 49. I am unable to take this view, because it would seem to me that the acts of the defendants did not amount to mere trespass on immoveable property as provided for in Art. 39, but to “trespass” and “conversion” of immoveable property (not “moveable property” to which Art. 49 applied), and that such acts of tort constitute “malfeasance” within the terms of Art. 36. There is no provision in the Letters Patent for reference to a third Judge, when there is a difference of opinion in a Letters Patent appeal. The appeal is therefore dismissed with costs. This order governs the analogous appeals, which are also dismissed with costs.

Doss J. This is an appeal in an action brought by the plaintiff for compensation under the following circumstances :—

In his plaint he alleged that the defendant No. 1 set up defendant No. 8, as the landlord and the husband of defendant No. 9 as the tenant, with regard to his holding and having obtained a process for distraint from the Court, caused the standing crops on his holding to be distrained and subsequently cut and removed them in collusion with the peon,

(1) (1898) I. L. R. 25 Calc. 692. 2) (1895) I. L. R. 22 Calc. 877.

(3) (1905) 9 C. W. N. 376.

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deputed by the Court to distrain the crops and that thereby he had sustained great loss. Among various other pleas, which for the purposes of this appeal it is unnecessary to notice, the defendant No. 1 raised the plea of limitation and denied the facts alleged by the plaintiff. The Munsiff found the allegations of the plaintiff to be true and he overruled the plea of limitation on the ground that Article 48 of the second schedule of the Limitation Act, which provides 3 years as the period of limitation for a suit of this kind, applied to the case, and that, as the suit had been brought within 3 years from the date of cutting the crops and the removal thereof from the holding (though more than 2 years after that date), it was within time. On appeal by the defendants, the learned Subordinate Judge concurred in the finding of the Munsif on the facts and with regard to the question of limitation thus observed in his judgments. "In these cases persons having no concern with the lands yielding the crops in dispute are the tortfeasors, so Art. 39 appears to my mind to be applicable and Arts. 48 and 49 may apply to the removal of the crop itself." As 3 years' limitation is provided by each of these Articles, he held that the suit was saved from limitation.

On appeal by the defendants to this Court, the learned Judge, who decided the appeal, has, relying on the case of *Mohesh Chandra Das v. Hari Kar* (1), held that the suit fell within Article 36 of Schedule II of the Limitation Act, which allows 2 years for bringing such a suit, and, as it was brought more than 2 years after the date of the cutting and removal of the crops, he has held that the suit is barred by limitation.

The plaintiff has appealed from this judgment under section 15 of the Letters Patent.

I think the view taken by the learned Judge of this Court is opposed to the decision of the Full Bench in the case of *Mangun Jha v. Dolhin Golab Koer* (2). I am of opinion that the view taken by the learned Subordinate Judge on the question of limitation is correct.

In the last mentioned case the defendants under colour of an order of the Criminal Court had wrongfully cut

(1) (1905) 9 C. W. N. 376.

(2) (1898) I. L. R. 25 Cal. 692.

and carried away standing crops from the plaintiff's land. Similarly in the present case the defendant No. 1, who is a perfect stranger and not the landlord of the plaintiff, had obtained an order for distraint in the name of a fictitious landlord against a fictitious tenant; and under colour of that order had caused the standing crops on the plaintiff's land to be distrained. This is not a case of illegal or irregular distress (which I understand to mean distress in contravention of the provisions of law relating to distress) by the landlord, but by a perfect stranger. When, therefore, the defendants, under colour of such an order for distraint entered upon the land of the plaintiff and cut the standing crops on it, they clearly committed a pure act of trespass upon his land and when they took away the crops after they had been severed from the land, they wrongfully took away "specific moveable property." It appears to me, therefore, that the fact of the so-called distraint in this case makes no material difference, and it is to my mind indistinguishable from the Full Bench case, at any rate so far as the *ratio decidendi* of that case is concerned.

I do not think Article 36 applies to this case. The words of that Article in the first column are "for compensation for any malfeasance, or misfeasance or nonfeasance independent of contract and not herein specially provided for." I am inclined to think that the following passage in Stephen's Commentaries, 14 Ed., Vol. III, page 384, furnishes a guide to the sense in which these words have been used in this Article. That passage runs thus:—"Personal actions are actions founded either on contracts or on torts; that is to say, they are either actions *ex contractu* or actions *ex delicto*; torts being wrongs independent of contract; and being either (i) nonfeasances, or the omission of acts which a man was by law bound to do, or (ii) misfeasances, or the improper performance of lawful acts or (iii) malfeasances, or the commission of acts, which were themselves unlawful." This view gains support from the fact that in Article 40 of Act IX of 1871, which has been re-enacted in Article 36 of Act XV of 1877, the words were "for compensation or any wrong,

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malfeasance, nonfeasance or misfeasance, etc." In the last mentioned Act the expression "wrong" has been omitted on account of redundancy, the next succeeding words malfeasance, nonfeasance or misfeasance, taken together denoting the same idea, and covering the same ground as is done by the preceding generic word "wrong," and being in fact subdivisions of the latter. There cannot, therefore, be any doubt that Article 36 contemplates suits for compensation for all kinds of torts or wrongs, except those for which special provision has been made by other Articles in the same Act. Articles 39 and 49 together with several other Articles, to which it is not necessary to refer, fall within this exception and for them a period of 3 years' limitation has been provided. In the same volume of the Commentaries at page 385, trespass is thus defined: "trespass" where the plaintiff claims damages for a trespass *vi et armis*, i.e., for an injury accompanied with actual force, i.e., wrongful entry upon land or a wrongful taking and keeping of personal chattels: "trover" where the wrongful taking being waived the plaintiff claims damages for the wrongful keeping or "wrongful conversion."

Trespass may be committed by an entry on 'another's' land i.e., trespass *quare clausum fregit*) or by taking another's goods (trespass *de bonis asportatis*). Conversion is an unauthorized act, which deprives another of his goods, and the essence of the wrong is the dealing with the use and possession of the goods of another adversely to him and in a manner inconsistent with his right of dominion

It seems to me, therefore, that Article 30 of the second schedule of the Limitation Act corresponds to the first kind of trespass; Article 48 and the first portion of Article 49, which is "for other specific moveable property or for compensation or wrongfully taking or injuring the same," correspond to the second kind of trespass, or asportation (Article 48 relating to trespass or asportation, where the owner has no knowledge of the person, who has possession of the goods and the first portion of Article 49 relating to trespass or asporta-

tion where he has such knowledge); and the second portion of Article 49 corresponds to conversion.

If the defendants, after entering on the plaintiff's land, had cut the standing crops and left them there, the wrong thus done would have been a trespass upon immoveable property coming within Article 39, the act of cutting the crops being an aggravation of the wrong committed by the bare entry on the land and calling for substantial damages. By the act of cutting the crops a portion of the immoveable property (standing crop before it is severed from the land being manifestly immoveable property) is transmuted into specific moveable property, the right to which is vested in the owner of the land, albeit the transmutation is effected by the act of the tortfeasor. Suppose the tortfeasor, after he has cut the crop, is prevented by the owner from taking it away and is expelled from the land, and a little while after, when the owner happens to be absent, a third person comes in and takes the crop away, the taking of the crop by the third person would, in that case, clearly amount to "wrongfully taking away specific moveable property." Why should the removal of the crop by the tortfeasor himself, soon after he has cut the same, be any the less wrongful taking away of "specific moveable property?" Indeed, the character of moveable property is impressed on the crop the moment it is severed from the land. Why should the person, so to say, of the appropriator cause any difference in the character of the property? Why should the period of limitation in the former case be 3 years, and in the latter case 2 years? It is possible that the framers of Article 49 had not in their minds the case now in hand, but that is no reason why we should not apply that Article to it, if the ordinary and natural meaning of the words used fairly warrant its application. It seems to me, therefore, that the subsequent act of carrying away the severed crop is in the words of Article 49, "wrongful taking away specific moveable property" and falls within the first portion of that Article. It does not fall under Article 48, because the owner

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has from the beginning knowledge of the person, who has possession of the goods.

I am of opinion, therefore, that the suit falls partly under Article 39 and partly under Article 49, and 3 years being the period of limitation in each case, it is not barred by limitation.

For these reasons, the appeal ought to be decreed, the judgment appealed against set aside and the judgment and decree of the Court of Appeal below restored.

I regret very much I am constrained to differ from the learned Chief Justice in this case.

Appeals dismissed.

B. D. B.

APPELLATE CIVIL.

Before Mr. Justice Sharfuddin and Mr. Justice Coxe.

DIN TARINI DEBI

v.

KRISHNA GOPAL BAGCHI.*

1908

Dec. 2, 3, 14.

Will, validity of—Construction of Will—Sambandha-nirnaya patra, whether can operate as a will.

A *sambandha-nirnaya patra* (matrimonial arrangement deed) attested by two or more witnesses devising property (in favour of a person marrying the daughter of the executant of the deed) to take effect after the death of the executant and his wife, if revocable, operates as a valid will of the executant.

Shumsool Hooda v. Shewukram (1), *Hurpurshad v. Sheo Dyal* (2), *Kalian Singh v. Sanwal Singh* (3), *Haidar Ali v. Tasadduk Rasul Khan* (4), *Balbhaddar Singh v. Sheonarain Singh* (5), *Sita Koer v. Deonath Sahay* (6) and *Ram Moni Dasi v. Ram Gopal Shaha* (7) referred to.

APPEAL by Din Tarini Debi, the objector No. 2.

This appeal arose out of an application for the grant of Letters of Administration with a copy of the will annexed alleged to have been executed by one Ram Chandra Talapatra in favour of one Krishna Gopal Bagchi, the applicant for the grant.

It appeared that the youngest daughter of Ram Chandra was married to the petitioner, Krishna Gopal Bagchi, who was then not in good circumstances. The document in question, *Sambandha-nirnaya patra*, was executed some days before the marriage and attested by three witnesses. The objectors alleged that the deed produced by the petitioner was not the genuine document executed by Ram Chandra; and they further urged that it was merely an agreement or marriage contract and, therefore, it could not operate as a will.

* Appeal from Original Decree, No. 443 of 1906, against the decree of S. N. Huda, District Judge of Pabna and Bogra, dated Sept. 6, 1906.

(1) (1874) L. R. 2 I. A. 7.

(4) (1890) I. L. R. 18 Calc. 1;
L. R. 17 I. A. 82.

(2) (1876) L. R. 3 I. A. 259.

(5) (1899) L. R. 26 I. A. 194.

(3) (1884) I. L. R. 7 All. 163.

(6) (1904) 8 C. W. N. 614.

(7) (1908) 12 C. W. N. 942.

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The document was executed by Ram Chandra Talapatra on the 16th Sraban 1296 B.S., and ran as follows :—

“Salutation to Prajapati (Lord of the creation).
 (Mark of Rupee in *Vermilion*).

“This auspicious deed of *Sambandha-nirnaya patra* (deed of matrimonial arrangement) is executed as follows :—I settle the auspicious marriage of my daughter, Srimati Trailokya Tarini Debi, with Sriman Krishna Gopal Deb-Sarma Bagchi The condition laid down in that behalf is that the said Sriman Krishna Gopal shall permanently live in my family dwelling house at Patul, maintaining the ceremonies in honour of the Deities and my ancestors ; and on the demise of me and of my legally married wife, he shall be entitled to, and be in possession of, all the moveable and immoveable properties left by me. It shall now rest with me to make all rules for the ceremonies and I shall do all things To this effect I execute this *patra* named the auspicious *Sambandha-nirnaya*.”

(Attested by—)

“Harish Chandra Bhowmik
 Panchanan Sarma Talapatra
 Lakshmi Kantha Sarma Talapatra } of Patul.”

The above document was in the shape of a letter and addressed to one Ratanmoni Debi, an aunt of Krishna Gopal Bagchi.

The District Judge held that the document was a genuine one, and that as it was to take effect after the death of Ram Chandra and his wife, and as Ram Chandra had full power to alter or revoke it, the document was meant to be a will ; and he accordingly granted Letters of Administration to the petitioner.

The objector No. 2 appealed to the High Court.

Babu Dwarka Nath Chakravarti (*Babu Rama Kanta Bhatta-charjee* with him), for the appellant. The document, *sambandha-nirnaya patra* is not a will at all. It was marked with vermilion to shew that it was merely a marriage contract, and was never intended to be a will. The signatures on the document were forged to give it an appearance of a testamentary disposition. The writer of the document refused to sign it. A *sambandha-nirnaya patra* being merely a marriage contract, it can never operate as a will. A similar question was decided in the Privy

Council case of *Bhoobun Moyee Debia v. Ram Kishore Acharj Chowdhry* (1). No testamentary disposition was intended by this document—both the name of the document and the occasion of its execution being opposed to such a supposition. It is submitted that the document is not legally proved, and it not being a testamentary disposition, Letters of Administration should not be granted in this case.

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Babu Golap Chandra Sarkar (*Babu Mohini Mohan Chuckerbutty* and *Babu Debendra Nath Bagchi* with him), for the respondents. If there be a disposition of property to be carried into effect after the donor's death, it is a will. It is not necessary that the legatee should take possession of the property immediately at the death of the testator. In this case the wife has a life estate, and after her death the son-in-law is to get it. The following cases were referred to:—*Ram Moni Dasi v. Ram Gopal Shaha* (2) *Shumsool Hooda v. Shewukram* (3), *Hurpurshad v. Sheo Dyal* (4), *Haidar Ali v. Tasadduk Rasul Khan* (5), *Balbhaddar Singh v. Sheo Narain Singh* (6); and to Mayne's Hindu Law, 7th Edition, para. 429. The wording of the document is quite clear according to the provisions of the Succession Act. [SHARFUDDIN J. Could *Ram Chandra* alienate any portion of the property after the execution of the document, or revoke it?] Yes, he could; and he did actually alienate a portion of the same in his lifetime.

Babu Dwarka Nath Chakravarti, in reply.

Cur adv. vult.

SHARFUDDIN AND COXE JJ. This is an appeal against the order of the District Judge of Pabna, dated the 6th of September 1906, granting Letters of Administration with the will annexed to one Krishna Gopal Bagchi. The facts of the case

(1) (1865) 10 Moo. I. A. 279.

(2) (1908) 12 C. W. N. 942.

(3) (1874) L. R. 2 I. A. 7.

(4) (1876) L. R. 3 I. A. 259.

(5) (1890) I. L. R. 18 Calc. 1;
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(6) (1899) I. L. R. 27 Calc. 344; L. R. 26 I. A. 194.

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are that one Ram Chandra Sarma Talapatra had four daughters and one son. The youngest daughter, was named Srimati Trailokhatarini Devi. She was unmarried when a certain document, which is Exhibit I in this case, was executed by the deceased Ram Chandra Sarma Talapatra. His other three daughters had already been married at the time, and were living with their respective husbands. Ex. No. 1, which is propounded by the petitioner as the will of the deceased Ram Chandra, was executed in 1296 when the deceased was about 60 years of age. Exhibit I is styled in the document itself a *sambandha-nirnaya patra* and is in the form of a letter addressed to Ratanmoni Debi, an aunt of Krishna Gopal Deb Sarma Bagchi. The expression *sambandha-nirnaya patra* means a matrimonial arrangement deed. This letter informs the addressee that the writer has settled the marriage of his daughter with Krishna Gopal on condition that Krishna Gopal shall after the marriage live in the writer's family dwelling house at Patul, and that on the demise of the writer and his legally married wife, Krishna Gopal shall be entitled to, and be in possession of, all the moveable and immoveable properties left by him.

The above document appears to have been attested by three witnesses, namely, Hurish Chundra Bhowmik, Panchanan Sarma Talapatra, and Lakshmi Kantha Sarma Talapatra. The first two are said to be dead and the last has been examined as a witness for the petitioner. The objectors to the application are three, namely, Peary Mohan (son of the first daughter of Ram Chandra) Din Tarini Debi (his third daughter) and Debendra Narain Mozumdar (a son of the second daughter). It is admitted by the objectors that Ram Chandra executed a *sambandha-nirnaya patra*—a little before his youngest daughter's marriage; but it is said that the document propounded by the applicant is not the one that was so executed; and that even assuming the document to be genuine, it cannot operate as a will. It is only the objector No. 2, namely, Din Tarini Debi, who now appeals to this Court, and the grounds

taken before us are identically the same as were taken in her petition of objection, dated 20th of April, 1906.

Before dealing with the proper interpretation of the deed in question, we will dispose of the appellant's allegation that the document, Ex. I, is not the one that was executed by Ram Chandra before his youngest daughter's marriage. It is urged on behalf of the appellant that it is not customary for such a document to be attested by witnesses. This no doubt is true, but in this connection we must not lose sight of the fact that the intending bridegroom was a young man in poor circumstances, who expected to improve his pecuniary circumstances by his marriage with the daughter of an old man, who was in possession of some properties. Witnesses say that it was Krishna Gopal himself who desired that the document should be attested by witnesses. We think that Krishna Gopal's anxiety to secure attestation of witnesses was nothing but natural. That he should want to make his position pecuniarily better by securing a deed, which could be used to his own benefit, is consistent with his poor and straitened circumstances. He was in fact induced to marry Ram Chandra's youngest daughter by the hope of getting all the properties that Ram Chandra might leave after his death. It is urged on behalf of the appellant that no witness attested the document that was really executed by Ram Chandra, and that the document propounded is not the document that was executed, in other words it is alleged that this is a forged document and that two dead men's names have been forged as attesting witnesses. This document was executed in 1296, which corresponds to 1889 A. D. The application for Letters of Administration was made in 1906, that is to say, seventeen years after execution. Two of the witnesses are said to have died during this interval. It is evidently not at all improbable that two of them should die during this period. If this were a forged document, as is alleged, it would have been the easiest thing possible to secure its attestation by three living persons instead of forging the names of two men, who are said to have died, thus weakening the case by having only one wit-

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ness to attest the document. A forger always takes good care to remove all suspicions ; but here, if we accept the theory of forgery, we find the applicant relying on the slender testimony of one single witness. If we are to accept the evidence of Lolit Mohan Talapatra, witness No. 2 for the objector, we should have to find that the signature of Lakshmi Kantha Talapatra has also been forged. This witness on seeing the deed in question says.—“The signature in this deed is not that of Lakshmi Talapatra.” But we find that Lakshmi Talapatra, witness No. 1 for the applicant, on seeing Exhibit No. I says “This bears my signature.” If Lakshmi Kantha Talapatra is a creature of the applicant and has given false evidence in attesting as his own a signature which is not his, it is surprising that, if he was prepared to go so far, he should hesitate to put his signature on the deed and attest it as his own.

We find from the evidence of Lolit Mohan, witness No. 2 for the objector, that he is not prepared to swear that Ram Chandra's signature on the deed is not genuine. He says that he has seen Ram Chandra sign his own name, but he adds “It is difficult for me to say whether it is Ram Chandra's writing or not.” Although at another place he says “I do not know whose signature it bears. It does not seem to me to be Ram Chandra's signature.” The evasive manner in which he gave the above answers indicates the signature to be that of Ram Chandra's. Lakshmi Kantha Talapatra, witness No. 1 for the applicant, who is one of the attesting witnesses and also Harish Bhowmik, also an attesting witness, were present at the marriage assembly—(*vide* deposition of Shama Charan Roy, witness No. 1 for the objector). These two men must be either relations or friends of the parties contracting the marriage, and it is not at all surprising that they should also be present at the time of the execution of Exhibit I and being present it is very likely that they should have been asked by Krishna Gopal to attest the deed. According to the applicant's case, Exhibit I was written by Abhoya Gobinda Chuckerbutty, who has been examined by him and according to the objector's case the *patra* that was executed was written by

Denabundhoo Chuckerbutty, who has not been examined by the objector, as it is alleged that he is dead. It again appears from the evidence of Lolit Mohan Talapatra that at the time of the execution of the *sambandha-nirnaya patra* there were present Panchanan Talapatra, and Harish Bhowmik along with some other people. When the presence of these two men at the time of the execution of Exhibit I is admitted, there is no reason to suppose that they did not attest that document, when so asked. For the above reasons, we are of opinion that Exhibit I is the document that was executed as *sambandha-nirnaya patra* by Ram Chandra.

The next point urged is that, conceding Exhibit I to be the *patra* executed by the deceased, it cannot operate as a will.

The definition of the expression "Will," as given in the Probate and Administration Act (V of 1881) and the Indian Succession Act, X of 1865, is "the legal declarations of the intentions of the testator with respect to his property, which he desires to be carried into effect after his death."

The important passage in Exhibit I, which corresponds with the above definition, is "and on the demise of me, and of my legally married wife he (Krishna Gopal) shall be entitled to, and be in possession of all the moveable and immoveable properties left by me." The above passage is a clear indication of the wishes of Ram Chandra with regard to such of his properties as may be left by him. It is contended on behalf of the applicant that Exhibit I is not in the form of a will, and that the form indicates that the document could not have been intended to be testamentary, and that the name of the document itself is against such a supposition. There is no doubt that the passage quoted above shows the testamentary wishes of the deceased. According to a very learned authority on Hindu Law, the form of the will is immaterial, (Mayne on Hindu Law and Usage). Petitions addressed to officials or answers to official enquiries have been held to amount to wills: *Shumsool Hooda v. Shewukram* (1)

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Sheonarain Singh (4).

No technical words are necessary for a will. The rule of construction in a Hindu as in an English will, is to try and find out the meaning of the testator, taking the whole of the document together, and to give effect to its meaning. In applying the above principle Courts of Justice in this country ought not to judge the language used by a Hindu, according to the artificial rules, which have been applied to the language of people, who live under a different system of law, and in a different state of society. In the case of *Ram Moni Dasi v. Ram Gopal Shaha* (5), it was held that a document, which contains directions regarding the executant's property after his death, which in certain circumstances may be revoked, is a will. A perusal of that case shows that the intentions of the testator in it were almost exactly the same as those of Ram Chandra in the present case. It was a case, in which the wishes of the testator were embodied in a document styled *niampatra* and *ekrar*. For the above reasons we hold that it is immaterial what the form of a document may be, but if it embodies the legal declarations of the intentions of the testator with respect to his property, which he desires to be carried into effect after his death, it is a will. We find that in this case the testator's desires, with regard to his properties that may be left after his and his wife's death, are fully expressed in the passage in Ex. I quoted above.

It is important to note here that Exhibit I does not specify the properties bequeathed, it only says that Krishna Gopal will be entitled to anything that might be left after the death of Ram Chandra and his wife. Ram Chandra could have dealt with the properties that he had in any manner he might have liked notwithstanding the execution of Exhibit

(1) (1876) L. R. 3 I. A. 259.

(2) (1884) I. L. R. 7 All. 163.

(4) (1899) L. R. 26 I. A. 194.

(3) (1890) I. L. R. 18 Cal. 1;

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(5) (1908) 12 C. W. N. 942.

I. If he could have so dealt with the properties, he could have made Exhibit I infructuous. This document which, as has been observed, is not addressed to Krishna Gopal, had no binding effect on the testator; and he was therefore free to revoke it. That being so, the document in question operates as a will. We are supported in the view that we have taken, by the case of *Sita Koer v. Deonath Sahay* (1), where it was held that in ascertaining whether a document is a will one of the tests is to ascertain whether the document is revocable or not. The irrevocability of a document is perfectly inconsistent with its being a will. We have shown above that the document in question was revocable and we therefore hold that it is a will.

It has been contended on behalf of the appellant that at the time of the execution of Exhibit I, it was impossible to say whether Ram Chandra's wife was going to survive him or not, and in case of the survival of the wife, she was given, under the terms of Exhibit I, only a life-interest. But the fact that the legacy to Krishna Gopal was postponed, until the death of the testator's wife, does not make the document any the less a will. In this connection we may refer to *Ram Moni Dasi v. Ram Gopal Shaha* (2) already quoted, as well as to section 106 of the Indian Succession Act (X of 1865).

For the above reasons, we hold that the judgment of the learned District Judge is correct in holding that Exhibit I operates as a will.

We, therefore, dismiss this appeal with costs.

Appeal dismissed.

R. D. B.

(1) (1904) 8 C. W. N. 614.

(2) (1908) 12 C. W. N. 942.

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CRIMINAL REVISION.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

DASARATHI MAHAPATRA

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1908

May 4.

Rioting—Common object of unlawful assembly—Necessity of express finding on the point by the Lower Courts in their judgments—Criminal Procedure Code (Act V of 1898) ss. 367 and 424—Indian Penal Code (Act XLV of 1860) ss. 141 and 147.

Where the common object of an unlawful assembly was stated in the charge to be to enforce a right or supposed right, and there was no dispute as to the common object in the lower Courts, which did not, therefore, discuss the question or come to any express finding in so many words on the point, it was held that they had impliedly found the common object of the assembly to be the same as stated in the charge, and that the accused had been in no way prejudiced.

Sabir v. Queen-Empress (1), *Poresh Nath Sircar v. Emperor* (2), distinguished.

CRIMINAL RULE.

THE complainant, Raghu Sahu, and some 10 or 12 other men, were cutting paddy on certain land, the possession of which was in dispute, when the petitioner came up to them and remonstrated, but finding them still reaping he called out his party who, about 30 in number, came up armed and attacked the complainant's party and wounded several of them. The accused were put on their trial before the Deputy Magistrate of Balasore under section 147 of the Penal Code. The common object laid in the charge was to enforce a right or supposed right to the land. The trying Court discussed only two questions, viz., as to the identity of the land as that of which the complainant's father-in-law had been put in possession by the Civil Court, and as to who was in possession. He found possession with the complainant, and convicted and sentenced the accused. An appeal from the conviction was dismissed.

* Criminal Revision No. 242 of 1908, against the order of B. C. Sen, District Magistrate of Balasore, dated the 27th of February 1908.

(1) (1894) I. L. R. 22 Calc. 276.

(2) (1905) I. L. R. 33 Calc. 295.

Neither Court alluded to the common object, and there was no express or specific finding on this point, no question having been raised as to it in either Court.

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Mr. Monnier (Babu Bidhu Bhusan Ganguli with him) for the petitioners. Before a conviction under section 147 of the Penal Code can be upheld there must be first a clear statement of the common object in the charge: *Behari Mahton v. Queen-Empress* (1), and next the common object must be expressly found by the lower Courts: *Sabir v. Queen-Empress* (2). If the judgment does not contain a finding as to the common object, the conviction is bad on that ground alone: *Poresh Nath Sircar v. Emperor* (3). [RAMPINI J. But what are the sections of the Code, which lay down the law in such terms.] An assembly of five or more is only unlawful when animated by the one or the other of the five common objects set forth in section 141 of the Penal Code. It is, therefore, necessary to show in the charge that some such common object existed. The *Illustrations* to sections 221 and 223 of the Criminal Procedure Code indicate, that in the case of well known offences, which can be committed only in a limited number of ways, e.g., murder or theft, it is not necessary to specify any particulars, but in cases like rioting, where the offence is made out only on the existence of certain common objects, the particular common object alleged must be stated in the charge. Next sections 367 and 424 of the Criminal Procedure Code require a statement of the points for determination and the decision thereon. In other words the judgments of the lower Courts must expressly contain all findings necessary to constitute the offence, and the common object must, therefore, be *expressly* found. Further the Assistant Settlement Officer found the petitioner in possession and the Magistrate should have followed the finding. He has also determined the question of possession on the merits.

(1) (1884) I. L. R. 11 Calc. 106.

(2) (1894) I. L. R. 22 Calc. 276.

(3) (1905) I. L. R. 33 Calc. 295.

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Babu Dasarathy Sanyal for the opposite party. No objection was taken to the common object in the Courts below. The ruling in *Poresh Nath Sircar v. Emperor* (1) is not opposed to me. In that case the common object was not even *by implication* found in the judgments of the lower Courts. Here there is such a finding. The decision of the Assistant Settlement Officer was not finally published at the time and could have no effect. The order of the Magistrate is also based on the oral evidence.

RAMPINI AND SHARFUDDIN JJ. This is a Rule to show cause why the conviction of, and sentences passed on, the accused should not be set aside. The accused have been convicted under section 147 of the Indian Penal Code of rioting, and sentenced to undergo rigorous imprisonment for a month and to pay a fine of Rs. 20. They have been found to have attacked the complainant and others, while cutting their paddy. The accused party were about 30 in number. This complainant was beaten and wounded and taken to the thana in a *dhuli*.

The main question debated in the lower Courts was as to the possession of the land. Both the Courts below found that the complainant had been in possession of the land since 1905. His predecessor-in-interest, that is, his father-in-law, had obtained a decree in the Civil Court and had been put in possession of the land by the Civil Court, and an under-raiyat, named Shibo Jana, who had been in actual possession till then, had gone out and the complainant's father-in-law and the complainant had been ever since in direct possession and cultivation. The accused, had, therefore, no possible right to interfere with the complainant when cutting the paddy. They have been rightly convicted of an offence under section 147 of the Indian Penal Code.

(1) (1905) I. L. R. 33 Calc. 295.

The learned Counsel for the petitioner impugns the conviction on technical grounds, the principal of which is that there is no finding in the judgments of the lower Courts as to the common object of the unlawful assembly. He relies on the rulings in the cases of *Sabir v. Queen-Empress* (1) and *Poresh Nath Sircar v. Emperor* (2) as authorities for holding that this is essential. The charge in this case was, however, properly drawn. The common object was therein stated to be to enforce a right or supposed right. Now there was no contest in either of the lower Courts as to the common object. Nobody ever contended that the common object of the assembly, if any, was not to enforce a right or supposed right. The lower Courts have, therefore, not discussed this question, and have come to no express finding, couched in so many words, on this point, but it is clear that they both impliedly have found that the common object of the unlawful assembly was as stated in the charge.

In the case of *Sabir v. Queen Empress* (1) it is only said that "there should be a clear (not an express) finding as to the common object," and the reason for that expression of opinion was that in that case there were two possible common objects of the assembly, and it was not apparent which of them had been accepted by the Judge and the Jury. In the case of *Poresh Nath Sircar v. Emperor* (2), according to Mr. Justice Mookerjee, the judgment of the Magistrate contained no finding what the common object of the assembly was, and the facts found by the Sessions Judge completely negatived the common object set out in the charge, which, it is pointed out, was not stated with due precision. The accused were, therefore, held to have been prejudiced. The facts of the present case are very different. As has been already explained, there is no defect in the charge. It was never contended that the common object of the assembly was or could be other than that set out in the charge. No plea on the point was raised in

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(1) (1894) I. L. R. 22 Calc. 276.

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either of the lower Courts, and from the judgments of both Courts it is clear that they found the common object of the assembly to be the same as stated in the charge. The accused have in no way been misled or prejudiced.

We discharge the Rule. The petitioners must be remanded to jail to undergo the remainder of their sentences.

Rule discharged.

E. H. M.

CRIMINAL REVISION.

Before Mr. Justice Sharfuddin and Mr. Justice Coxe.

HOPCROFT

v.

EMPEROR.*

1908

November 6.

European British subject, criminal proceedings against—Competency of native mofussil Magistrate to hold an inquiry against a European British subject under s. 107 of the Criminal Procedure Code (Act V of 1898)—Applicability of s. 443 of the Code to such inquiry.

The provisions of section 443 of the Criminal Procedure Code apply to an inquiry held under section 107 thereof.

The party against whom such an inquiry is instituted is in the position of an accused.

Queen-Empress v. Mutasaddi Lal (1), *Queen-Empress v. Mona Puna* (2) and *Jhoja Singh v. Queen-Empress* (3), referred to.

CRIMINAL RULE.

UPON the receipt of a police report that there was a likelihood of a breach of the peace between Bhonu Lal Chowdhry and the petitioner, who was the manager of the Dholi Factory and six others, Mr. W. J. Stark, a Deputy Magistrate of Mozufferpore, drew up a proceeding under section 107 making Bhonu Lal the first party, and the petitioner and the others the second party.

Mr. Stark was transferred, and the case came on before Mr Rowland Chandra, a Bengali Deputy Magistrate, who was not a Justice of the Peace, though he possessed first class powers. The petitioner claimed the right to have the inquiry held in accordance with Chapter XXXIII of the Criminal Procedure Code on the ground that he was a European British subject.

The matter was referred to the District Magistrate

* Criminal Revision, No. 1077 of 1908, against the order of W. J. Stark, Deputy Magistrate of Mozufferpore, dated the 7th August 1908.

(1) (1898) I. L. R. 21 All. 107.

(2) (1892) I. L. R. 16 Bom. 661.

(3) (1896) I. L. R. 23 Calc. 493.

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who, relying on a note in Prinsep's Criminal Procedure Code (14th Edition), page 552, disallowed the claim. The inquiring Magistrate then gave the petitioner time to apply to the High Court for a transfer.

Mr. Godfrey (Babu Haroprasad Chatterjee with him) for the petitioner. The word "inquiry" in section 443 of the Code includes an inquiry under section 107 of the Code. The word "charge" is not used in the former section in the restricted sense of the formal charge, which a Magistrate draws up in cases of offences, but in the wider sense of an *accusation*. It is submitted that Sir Henry Prinsep's note to section 443 to the contrary is not correct.

SHARFUDDIN AND COXE JJ. This is a Rule on the District Magistrate of Mozufferpore to show cause why the case should not be transferred from the file of the trying Magistrate to that of any other Magistrate competent to try the same, on the ground that the trying Magistrate had no jurisdiction to inquire into the matter under section 443 of the Criminal Procedure Code.

Under section 443 of the Criminal Procedure Code no Magistrate, unless he is a Justice of the Peace, and (except in the case of a District Magistrate or Presidency Magistrate) unless he is a Magistrate of the first class and a European British subject, shall inquire into or try any charge against a European British subject.

From the Explanation submitted by the Magistrate there is nothing to show that the petitioner is not a European British-born subject, and we are told that the matter was not at all disputed. The question is whether the expression "inquire into or try any charge" applies to proceedings under section 107 or not.

The party, against whom proceedings under section 107 of the Criminal Procedure Code are instituted, is in the position of an accused party, and when he is bound over to keep the peace, his liberty is, to a very great extent, qualified. In

Queen-Empress v. Mutasaddi Lal (1), it was held that a person, against whom proceedings under Chapter VIII of the Code of Criminal Procedure are being taken, is an "accused person" within the meaning of section 437 of the Code. It appears from this case that the learned Judge, who tried it, followed *Queen-Empress v. Mona Puna* (2) and *Jhoja Singh v. Queen-Empress* (3).

If, therefore, the petitioner is an accused person, his case certainly comes under section 442 of the Criminal Procedure Code and, as a European British-born subject, is entitled to claim that he should be tried by a Justice of the Peace or a District Magistrate or Presidency Magistrate, provided the Justice of the Peace is a Magistrate of the first class and a European British-born subject.

In the above circumstances we make the Rule absolute, and direct that the District Magistrate do transfer the case to any Magistrate competent to try the petitioner.

E. H. M.

Rule absolute.

(1) (1898) I. L. R. 21 All 107.

(2) (1892) I. L. R. 16 Bom. 661.

(3) (1896) I. L. R. 23 Calc. 493.

CRIMINAL REVISION.

*Before Mr. Justice Sharfuddin and Mr. Justice Coor.*1908
Sept. 18.

NARENDRA LAL KHAN

v.

EMPEROR.*

Bail, grounds for granting or refusing—Remand to custody—Criminal Procedure Code (Act V of 1898) ss. 344, 497 and 498.

In exercising its discretion under section 498 of the Criminal Procedure Code the High Court should not confine its attention to the question whether the prisoner is likely to abscond or not. Other circumstances also may affect the question of granting bail to accused persons charged with crimes of a grave character.

If a person is accused before a Magistrate of a non-bailable offence then, unless he considers that there are no reasonable grounds for believing him to be guilty, the Magistrate must refuse bail, though he may be certain that the accused will stand his trial.

It is the right of an accused to demand that the charges against him should be tried without any unreasonable delay, and such delay will dispose the High Court to grant bail.

Where a police officer of superior rank deposed that he had evidence, which he believed, implicating the accused, and swore also to the truth of the first information, which alleged association of the accused in certain places and stated that the police had in their possession incriminating correspondence between the accused and a secret society in Calcutta, it was held that there was sufficient evidence for a remand under section 344 of the Code, but that there had been unreasonable delay as regards the prisoners, who had been in custody for about six weeks, though not in the case of those who were in jail for three weeks.

On the 8th July 1908 the house of one Peary Mohun Das of Midnapore was searched by the police and a bomb found. Santosh Chandra Das, the son of Peary Mohun, was arrested, in consequence, under the Explosive Substances Act (VI of 1908), and placed before the Joint Magistrate on the next day, and remanded to custody till the 23rd, on which date and after he was again remanded, without being brought before the Magistrate, to the 7th and 21st August. In the meanwhile he made a confession to the Magistrate on the 29th July. On the 31st

* Criminal Revision Miscellaneous No. 134 of 1908, against the order of J. Bryne, Offg. Sessions Judge of Midnapore, dated Sept. 12, 1908.

July a bomb was found in the record room of two persons, named Saroda Prosad Dutt and Saroda Prosad Dutt and another in a drain belonging to the premises, and these two with six others were thereupon arrested and taken before the Magistrate on the 1st August, and remanded to the 15th instant, on which date one of them, Surendra Nath Mukerjee, made a confession before a Deputy Magistrate implicating a large number of persons in Midnapore. This batch of accused was then remanded to the 31st instant.

On the 28th August Mazharul Huq, a Deputy Superintendent of Police at Midnapore, sent in a police report to the Joint Magistrate praying for search and arrest warrants, under sections 4, 5 and 6 of the Explosive Substances Act, against the Raja of Narajole and 19 others, residents of Midnapore. Upon receipt of this report the Magistrate, professing to act upon it and the two recorded confessions, issued the warrants. The houses of the Raja and of 17 others were searched on the 28th, and they were arrested and put up before the Magistrate on the next day and remanded till the 7th September. On the 31st August Santosh and Surendra retracted their confessions, alleging that they had been obtained by police ill-treatment. The deposition of Lal Mohun Guha, a local Inspector of Police, was taken on the same day. He proved the finding of the bombs, and stated that his inquiries showed that the accused, who were then in the dock, except three, were members of a conspiracy for the manufacture of bombs to kill Europeans.

On the 7th September all the accused were placed together before the Joint Magistrate. A first information report was filed by Mazharul Huq alleging that the accused were members of a secret society operating at various places in Midnapore and elsewhere, having as one of its objects the assassination by bombs of Mr. Weston, the District Magistrate of Midnapore. It was further stated in the report that the police had seized incriminating correspondence connecting the accused with a secret society in Calcutta. Santosh and Surendra repeated the retraction of their confessions on the 8th September. Lal Mohun Guha was examined on the same

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date, and stated that his inquiry had put him in possession of information, which he believed to be trustworthy, that the offences charged in the first information were committed by the accused. On the same day Mazharul Huq deposed to the same effect and also to the correctness of the first information. The accused applied for bail to the Magistrate, but it was refused the next day, as he found that there were reasonable grounds for believing that each accused was guilty of the offences charged. The case was then postponed to the 23rd instant.

The accused thereafter renewed their application for bail before the Sessions Judge contending that, as the confessions had been retracted, there was no evidence against them. The Judge declined to grant bail on the ground that two police officers had deposed that there was further evidence, the character of which the Magistrate was aware of, and that the period of custody of most of the accused was not unduly long having regard to the nature of a case of conspiracy. Against this order the accused moved the High Court.

Mr. P. L. Roy (Mr. Keays, Mr. Khodabux and Babu Joy Gopal Ghose with him) for the Raja of Narajole. The Raja is a wealthy man and has a large stake in the interest of order. He was arrested on the 28th and placed before the Magistrate the next day. There has been no evidence recorded to prove the guilt of the petitioner except the statements of two police officers that they have further evidence. This may be sufficient for a first, but not for an indefinite, remand. There can be no doubt that the Raja will appear and stand his trial. Under section 498 of the Code the Sessions Judge and the High Court have an unlimited discretion in the matter of granting bail. The main principle in considering the question of bail is whether the accused will stand his trial or abscond. Refers to *In re Barronet* (1), *Reg v. Scaife* (2), *In re Johur Mull* (3). The Raja is willing to stay in his own house at M. dnapore under a police guard.

(1) (1852) 1 El. & Bl. 1.

(2) (1841) 9 Dowl. 553.]

(3) (1906) 10 C. W. N. 1093.

Mr. Dutt (*Mr. Godfrey* and *Babu Peary Mohun Dass* with him) for Santosh and six others. As regards Santosh the case against him was complete on the 8th July, and he ought to have been brought before the Magistrate. There is no evidence against the others.

Mr. Chuckerbutty (*Mr. K. N. Chowdhry*, *Mr. A. N. Chowdhry* and *Babu Monmotho Nath Mookerjee*) for Upendra Nath Maiti and others. The principal matter a Court has to consider in such cases is the possibility of the accused absconding. These accused are gentlemen of position, and they would not absent themselves. There is no evidence against them.

Mr. K. N. Chowdhry (*Mr. A. N. Chowdhry* and *Babu Monmotho Nath Mookerjee* with him) for Khagendra Nath Banerjee. There is nothing against this accused in the evidence.

Mr. Mullick (*Mr. Dutt* and *Babu Peary Mohun Dass* with him) for Baroda Prosad Dutt and others adopted the same line of argument.

Mr. Baxter for the Crown. Santosh has been a considerable time in custody, but a bomb was found in his house and he has confessed. A case of conspiracy by being members of a secret society must take a long time to unravel. The question is whether there has been an unreasonable delay. The real remand was on the 9th September. Arrangements had to be made to have the cases tried together. The question is whether *prima facie* there is no reason to believe the accused guilty. Refers to the first information. The charge is not only with respect to the finding of the bombs, but also that there is a secret society in Midnapore, one of the objects of which is to kill Mr. Weston. The case of *In re Barronet* (1) is in my favour. *In re Johur Mull* (2) is distinguishable. The only question is not whether the accused will appear at the trial. The charges are very serious. The retracted confessions are admissible against the persons making them: *Queen-Empress v. Raman* (3), and, if corroborated strongly, also against the others: *Yasin v. King-Emperor* (4). The investigation was

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(1) (1852) 1 El. & Bl. 1.

(2) (1906) 10 C. W. N. 1093.

(3) (1897) I. L. R. 21 Mad 83.

(4) (1901) I. L. R. 28 Calc. 689.

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not completed on the day of the last remand. The case will be ready by the 29th September.

SHARFUDDIN AND COHE JJ. The petitioners in these cases are accused of offences under the new Explosives Act, 1908. The offences which they are alleged to have committed are non-bailable. They were arrested on warrants and after arrest were produced before the Magistrate, who committed them to jail pending trial. Applications for bail have been made to the Magistrate and the Sessions Judge and refused. They now apply to this Court for bail.

It has been strongly pressed upon us on their behalf that these persons are not likely to abscond, and certain English authorities have been cited which lay down the principles on which bail is granted in that country.

We are not prepared, however, to agree that the decisions of English Courts are necessarily a safe guide to us in interpreting sections of our own Code; and we observe that the cases cited refer to offences of much less gravity than those of which the present petitioners are accused. We doubt very much if English Judges would lend a ready ear to applications for bail on behalf of persons accused of offences of the gravity indicated in the papers before us. Nor are we prepared to admit that, in exercising our discretion under section 498 of the Criminal Procedure Code, we should confine our attention to the question whether the prisoner is or is not likely to abscond, as other circumstances may also affect the question of granting bail to persons accused of having committed crimes of a grave and serious nature. If a person is accused before a Magistrate of a non-bailable offence then, unless he considers that there are no reasonable grounds for believing him to be guilty, the Magistrate must refuse bail, no matter how certain he may be that the accused will appear to stand his trial. The Magistrate is probably in a better position than the Sessions Judge, and almost certainly in a better position than the High Court, to estimate the probability of the prisoners absconding.

It is illogical to suppose that the Legislature intended that the Sessions Judge and the High Court, in dealing with questions of bail, should be guided exclusively by a consideration, which the officer best qualified to estimate its value is debarred from referring to at all.

It is the right of an accused person to demand that the charge against him should be tried without any unreasonable delay, and such delay will certainly dispose this Court to grant bail. With respect to the bulk of the petitioners we are not prepared to say that the delay in proceeding against them has been unreasonable. They were arrested at the end of August, and it is now but little past the middle of September. We believe it is not at all unusual that a period of this extent should elapse between the arrest of persons accused of grave and serious crime and the commencement of the trial. In the case of offences under section 400 of the Indian Penal Code, which, so far as the difficulty of investigation goes, bear some analogy to the present case, which appears to be based to some extent on evidence of association, the period is usually far greater. Under section 167 of the Criminal Procedure Code a Magistrate, on the mere perusal of the entries in the police diaries relating to the case, to which of course the accused have no right of access, may from time to time authorise the detention of the accused in custody for a term not exceeding 15 days on the whole. Thereafter he can, under section 344 of the Criminal Procedure Code, by a warrant remand an accused for any term not exceeding 15 days at a time, if sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence and it appears likely that further evidence may be obtained by such remand. The evidence in this case is, in our opinion, sufficient to raise such a suspicion. A Police officer of superior rank has been examined and swears that he has evidence which, as he believes, implicates the accused. He swears also to the truth of the first information which sets out that the accused in the present case associate together in certain specified places, and that there is in the possession

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of the police incriminating correspondence connecting them with a secret society in Calcutta. We think that there are good reasons for believing that such evidence exists against all the accused persons. This evidence may be good or bad, but we do not think that its production can be said, as against the majority of the accused, to have been unreasonably delayed. We are assured by learned counsel for the Crown that the case will be taken up in earnest on the 23rd instant without fail, and if it is not taken up, which we do not at all anticipate, it will be open to the accused to renew their applications. In these circumstances we decline to grant bail to the majority of the petitioners.

But as regards the accused Maddhu Sudhan Dutt, Sham Lall Shaha, Saroda Prosad Dutt, Baroda Prosad, Nikunja Behari Maiti, we think the evidence of their complicity has been unreasonably delayed. They were arrested at the end of July and have been six weeks in custody, and evidence against them might, in our opinion, have been produced in addition to what has been before us. We grant their applications and direct that they be released on bail to the satisfaction of the District Magistrate. Another man who has been confined for a long time is Santosh, but in his case, bail is out of the question.

As regards Raja Narendra Lal Khan it is stated in the affidavit on his behalf that he has been delicately nurtured, and the deprivation of his customary food is prejudicial to his health. He states that he is willing to submit to conditions. It is perhaps a greater hardship on a man of position, brought up in luxury and holding a high position in society, to be subjected to jail rules than it is to men who have to make their way in the world. In the absence, as yet, of convincing direct evidence, we are willing to yield to this petitioner's request. He may be released on bail to the satisfaction of the District Magistrate on condition of his being guarded at his own house and debarred from all communications with persons said, rightly or wrongly, to be his associates in crime.

Of course it must be understood that these orders do not affect the right of the Magistrate hereafter on sworn testimony given before him, which in his opinion establishes a *prima facie* case against any or all the persons now released, to commit him or them again to custody. The applications of all but the above mentioned six persons are refused.

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Before Mr. Justice Mitra and Mr. Justice Coxe.

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Bail, grounds for grant or refusal of—Remand to custody—Reasonable evidence of prisoner's guilt—Criminal Procedure Code (Act V of 1898) ss. 344, 497 and 498.

Held, per Mitra J. (Coxe J. *dissente*.) that the main question for consideration in determining matters of bail is whether there are reasonable grounds for believing the accused guilty of the offences charged. Other considerations must also arise in deciding this question, and one of these, which has always guided English and Indian Courts, is whether there are any grounds for supposing that the accused would abscond.

Under section 497 of the Criminal Procedure Code an accused should ordinarily be released on substantial bail until reasonable grounds are made out for presuming his guilt. *In re Johur Mull* (1), followed.

If after a remand incriminating evidence is not adduced, and if the prosecution has already had sufficient time to adduce such evidence, the Court will reasonably conclude that such evidence is not forthcoming at the time. It should then under section 497, sub-section (2), release the accused on bail, whatever be the nature of the offence, though the preliminary enquiry should proceed. *Manikam Mudali v. Queen* (2), followed.

Whether there are reasonable grounds or not must be decided judicially, that is to say, there should be some tangible evidence on the record on which, if unrebutted, the Court can conclude that the accused might be convicted. The statement by a witness that he has seen a certain act of an incriminating character done by the accused might be sufficient. But if there be no evidence whatsoever, or evidence of a very flimsy character on the face of it, the inference will be, after a reasonable time has elapsed since the beginning of the enquiry, that there are no reasonable grounds for supposing the accused to be guilty. The prosecution must, however, have a fair opportunity of adducing evidence of a really incriminating nature. At all events, the first information report should indicate with sufficient exactness, the character of the evidence likely to be forthcoming.

The detention of an accused under trial is not intended to be penal, but its object is to secure attendance. The gravity of the offence and some evidence of its perpetration by the accused will, however, justify detention.

* Criminal Revision Miscellaneous Nos. 140, 141, and 142 of 1908, against the order of C. H. Reid, Joint Magistrate of Midnapore, dated the 26th September 1908.

(1) (1906) 10 C. W. N. 1093.

(2) (1882) I. L. R. 6 Mad. 63.

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THE facts of this case down to the order of the High Court (SHARFUDDIN and COXE JJ.), dated 18th September, made in the case of *Narendra Lal Khan v. Emperor* (1), are fully stated in the report of that decision. The case when it went back to the Magistrate was taken up by him on the 23rd, 24th and 26th September. He examined the Joint Magistrate, who proved the issue of search warrants and the voluntariness of the confessions of Santosh Chandra Das and Surendra Nath Mukerjee. The Deputy Magistrate, who recorded the confession of the latter, was also called to prove that it was made voluntarily. The Jail Superintendent was then examined to establish that neither Santosh nor Surendra had made any complaints of ill-treatment by the police. The last witness was a kanungoe, who made the plans of the houses of Santosh and Baroda Prosad Dutt. The reports of the Chemical Examiner were also put in as evidence.

Applications for bail were made to the Magistrate but, except in the case of two, they were refused, and the case was remanded till the 19th October. The accused then moved the High Court for bail.

Mr. Dutt (*Mr. Morrison, Mr. Mullick, Babu Monmotho Nath Mookerjee and Babu Peary Lal Ghose*) for the petitioners, except Abinash Chandra Mitter. The whole matter turns upon the question, whether there is any ground for believing that the accused are guilty. If there is none, they are entitled to bail: *In re Johur Mull* (2). There are only the retracted confessions, but no further evidence. Refers to *Manikam Mudali v. Queen* (3). The prosecution has even failed to file a list of witnesses under sealed cover.

Mr. Morrison for Abinash Chandra. Upon the question of bail there must be a judicial belief in the guilt of an accused. Some *prima facie* case must be made out. The only evidence is the report and an expression of opinion by two police officers. The prosecution is even now unable to produce incriminating evidence.

(1) *ante* p. 166

(2) (1906) 10 C. W. N. 1093.

(3) (1882) I. L. R. 6 Mad. 63.

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Babu Hemendro Nath Mitter for the Crown. In the previous stage of the case (1) the High Court decided that there was sufficient evidence for a remand, and the only point is whether the case has been taken up in earnest. The prosecution intended to put in a list of witnesses at the next hearing. The only question here is whether there were reasonable grounds for the belief in the guilt of the accused. The Magistrate had before him the police report, the first information and the deposition of the police officers that there was evidence, which they believed to be credible, against the accused, apart from the retracted confessions.

MITRA J. There are four sets of petitioners before us. The first petition has been presented on behalf of Jamini Mullick and five others, the second on behalf of Akhil Chandra Sarkar and nine others, the third on behalf of Santosh Chandra Dass and Surendra Nath Mukerjee and the fourth on behalf of Abinash Chandra Mitter. The applications purport to be under section 497, read with section 498, of the Criminal Procedure Code.

A preliminary inquiry is now going on in the Court of the Joint Magistrate at Midnapore. The proceedings against most of the petitioners commenced practically on the 28th August 1908, but Santosh and Surendra had been arrested in July. All the petitioners have since then been in custody. Santosh and Surendra had been in custody from July. The offences with which they have been charged are non-bailable and undoubtedly of a very serious nature.

On the 7th September, the case came on before the Joint Magistrate, and there was a remand. The preliminary enquiry was commenced on the 23rd September, and witnesses were examined on that day and on the 24th and 26th September. The evidence that these witnesses gave was mostly such as would go only against Santosh and Surendra.

Very little evidence was adduced against the others during these days. On the 26th the enquiry was adjourned to the 19th October, and on the same day, the 26th, applications were made on behalf of the petitioners to be released on bail. The trying Magistrate, however, was of opinion that there were reasonable grounds for holding that the petitioners were guilty of the offences charged, and he, therefore, did not exercise the powers conferred on him by section 497 of the Criminal Procedure Code.

The petitioners have come up before us, and under section 498 of the Code we have concurrent jurisdiction with that of a trying Magistrate and not merely revisional jurisdiction.

The main question we have to consider in connection with these petitions is—are there reasonable grounds for believing that the petitioners are guilty of the offences of which they have been accused? Other considerations must also arise in deciding the question of releasing the accused on bail, and one of these, which has always guided Courts of Justice, both in England and India, is whether there are any grounds for supposing that the accused, if released on bail, would abscond and attempt to escape justice by avoiding or delaying an inquiry or trial. It is not necessary for me to state here at length the grounds on which bail ought to be granted or refused under section 497 of the Criminal Procedure Code. In one of the reported cases in India, *In re Johur Mull* (1), I expressed an opinion as to the matters, which a Court should consider, in deciding the question of granting or refusing bail. I was of opinion (and my learned brother Ormond J. agreed with me) that an accused might ordinarily be released on substantial bail, until reasonable grounds were made out for presuming his guilt. The words of sub-section (1) of section 497 would lead to his conclusion. To quote some of the words of the section “he (the accused) shall not be so released, if there appear reasonable grounds for believing that he has been guilty of the offence, of which he is accused.” Sub-section (2) of section 497 has

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made the rule of law quite clear. It lays down that the accused *shall* be released on bail, if there are no reasonable grounds for believing that he has committed such offence but that there are sufficient grounds for further enquiry into his guilt.

If after a remand evidence of an incriminating character is not adduced and if the prosecution had already sufficient time to adduce such evidence, the Court would reasonably come to the conclusion that such evidence was not forthcoming at the time. It should then, under sub-section(2), release the accused on bail, whatever be the nature of the offence, though the preliminary enquiry should proceed. This was the view taken by the Madras Court in *Manikam Mudali v. Queen* (1), and I agree with it.

The question of fact, therefore, is—are there reasonable grounds for believing that the petitioners are guilty of the offences of which they have been accused? Whether there are reasonable grounds or not is a question which must be decided judicially, that is to say, there should be some tangible evidence on which the Court might come to the conclusion that, if unrebutted, the accused might be convicted. The statement by a witness in the witness box that he has seen a certain act done, an act of an incriminating character, might be sufficient. As to whether the witness can be fully relied on or not is a question for subsequent consideration. But if there be no evidence whatsoever or evidence of a very flimsy character on the face of it, the inference would naturally be, after a reasonable time has elapsed since the beginning of the enquiry, that there are no reasonable grounds for supposing that an accused is guilty. The prosecution must, however, have a fair opportunity of adducing evidence of a really incriminating character. At all events, the first information report should indicate with sufficient exactness the nature of the evidence that is likely to be forthcoming. Ordinarily six weeks ought to be sufficient to start a case for the prosecution. If in any case in a preliminary enquiry more than six

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weeks has been taken without an earnest attempt being made to adduce direct or strong circumstantial evidence, my experience is that there is either no evidence of a tangible character, or if evidence is afterwards adduced, the chances are that that evidence is of an unreliable character. But that cannot be said with respect to every case. Cases of conspiracy stand upon a different footing. It takes a considerable time to collect evidence after information has been received by a police officer or a Magistrate. Ordinarily, however, if after an arrest, six weeks' time has elapsed or a shorter period according to the circumstances of a case, and no evidence of an incriminating character be produced against an accused, the Court should hold that there were, at that stage of the case, no reasonable grounds for further detaining the accused in custody, and the accused should be released on bail as provided for in sub-section (2) of section 497.

I need hardly add that if, during the course of the enquiry, subsequent to the order for release on bail, it be found that there is evidence against the accused, the Court can always exercise the power conferred on it by sub-section (3) of section 497 of the Criminal Procedure Code. This is what we said in *In re Johur Mull* (1):—"if it appears subsequently on the production of further evidence that a case has been made out against the petitioners or any of them, it will be competent for the Magistrate to declare the bail bonds cancelled and to direct the accused to surrender." The detention of an accused under trial is not intended to be penal, but its object is to secure attendance. The seriousness of an alleged offence, and some evidence of its perpetration by the accused would, however, justify detention.

I am of opinion that, so far as the preliminary enquiry in the present case has been gone into, no reasonable grounds have been made out against most of the accused. Some of them are gentlemen of position, and, if security of a substantila

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character is taken from them, there would be no apprehension that they would abscond and attempt to evade justice.

In the first application three of the petitioners are pleaders of the Midnapore Court, the others are zemindars, and they all appear to be respectable people. Against some of them there is absolutely no evidence. Against the others there are statements in the retracted confessions of Santosh and Surendra. The evidence already on the record cannot be considered to afford reasonable grounds for believing that they are guilty of the offences with which they have been charged. The trying Magistrate thinks that there are such reasonable grounds. He has not, however, indicated what these grounds are. The first information report does not give any substantial grounds besides the confessions of the two accused, Santosh and Surendra, which have since been retracted. No names of witnesses are given in the report, and even on the 26th September the prosecution was not evidently in a position to give to the Magistrate, even in a sealed cover, the names of at least some of the witnesses whom it was intended to examine. Neither has any evidence been given against these petitioners since they were arrested.

I am, therefore, of opinion that Upendra Nath Maiti, Nalini Kanta Sen Gupta, Gopal Chandra Banerji, Khagendra Nath Banerji, Manmatha Nath Kar and Jamini Mullick should be released on bail with two sureties each, the amounts of the bail-bonds being substantial, and they must be ascertained by the trying Magistrate, and, if he be absent from the station, by the District Magistrate or by such other Subordinate Magistrate as he may appoint for the purpose.

My observations with reference to the first set of petitioners apply to the second set, namely, Akhil Chandra Sircar, Kailash Chandra Das Mahapatra, Paran Chandra Chabri, Jotindra Nath Das, Deb Das Karan, Goshta Behary Chandra, Rash Behary Bose, Gobinda Chandra Mukerjee, Asu Tosh Das, and Jog Jeeban Ghose. Against some of these there is absolutely no evidence; against the others the evidence is of a most

unsubstantial character. It seems that some of these persons are not men of very good position. I am not, however, prepared to make a distinction between persons of very good position and those not of such position, if they can satisfy the Magistrate as to substantial bail with two sureties each.

As regards the third set of petitioners, Santosh Chandra Dass and Surendra Nath Mukerji, there is evidence against them as they made confessions incriminating themselves. They might have retracted their confessions; but the confessions are evidence against themselves. I cannot say there is reasonable ground for believing that they are not guilty. It might be that subsequent evidence would go to prove that they are really guilty. No case has been made out by them for release on bail, and their petition is, therefore, rejected.

The fourth petition is by Abinash Chandra Mitter. The affidavit shows that he is a gentleman of position, and, so far as evidence has been recorded, there is very little against him. I am of opinion that he also should be released on bail with two sureties, the amount of the bail also being of a substantial character.

As there has been a difference of opinion between my learned brother and myself, under section 36 of the Letters Patent of 1865, the opinion of the Senior Judge should prevail. The order of the Court, therefore, is that contained in my judgment.

COXE J. In this case I have the misfortune to be unable to agree with my learned brother.

When these applications came up about a fortnight ago the Bench of this Court, of which I was a member, held that there was sufficient justification for detaining the accused in custody, provided that the case was taken up in earnest on the 23rd September. To that decision I adhere, and it does not seem to me that we ought now to review that order or to consider again whether there is sufficient justification for detaining the accused.

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All that seems to me to be now open to discussion is whether the case has or has not been taken up in earnest. A special difficulty has arisen in this case for which the prosecution is not responsible, namely, that the Magistrate's Court is necessarily closed for the annual vacation. This occurrence does not seem to me, however, to give the accused any right to bail, which otherwise they would not have had.

Turning then to the question whether the case was taken up in earnest, I find no complaint in the petition that the Magistrate took less than the available time in dealing with the case. Four witnesses were examined, and the evidence was directed to a point certainly not of a formal nature but of very considerable importance to some of the accused, namely, whether the confessions made by them were voluntary or not. These accused persons are among the present applicants, but certainly they can have no cause for complaint that the case has not been duly proceeded with as against them.

It is pleaded strenuously on behalf of the others that this evidence is of no value against those others. This may be so, but I do not think that a case can be divided up in that way or that other accused persons are entitled to bail, while evidence against some of them is being taken. The case must be proceeded with in some order: and if evidence has been given against some of the accused, it cannot reasonably be said that the case has not been taken up in earnest against the others. I think the case was taken up in earnest, and that these applications should be refused.

In conclusion I would refer to one point, namely, that the remand being until the 19th October is for a period in excess of that allowed by law. On this the Magistrate points out: "The date to which the case is adjourned is the seventh open day after the Puja vacation. The first few open days are always a busy time, and as I shall myself be in Midnapore during the vacation, I expect to be absent for a few days after its close. No objection has been taken to the date fixed, in fact one counsel for the defence suggested it as a suitable date."

Having regard to this remark, I do not think that we should interfere in this matter because the remand is not strictly in accordance with the provisions of section 344.

I would, therefore, refuse these applications.

E. H. M.

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APPELLATE CIVIL.

Before Mr. Justice Stephen and Mr. Justice Doss.

FUL CHAND

v.

NAZAB ALI CHOWDHRY.*

1908
Nov. 10.

Mahomedan Law—Divorce—Talak—Dower, suit for—Limitation.

Under the Mahomedan Law, absence of the wife does not make the pronouncement of *talak* void and inefficacious.

Furzund Hossein v. Janu Bibi (1) and *Sarabai v. Rabiabai* (2), referred to and discussed.

SECOND APPEAL by the plaintiff, Ful Chand Bibi.

The plaintiff's allegation was that she married one Mosad Chowdhury in 1294 B.S. (1897), and that a registered *kabin* was executed by the husband, under which the deferred portion of the dower had not been paid, and became due, at the death of Mosad in the month of Assin last.

The defendants, the heirs, alleged to be in the enjoyment of the property left by the late Mosad Chowdhury, denied the liability and alleged that the plaintiff fled from her husband's house in 1304 B.S., and was thereupon divorced, on the following day by her husband, and that the father of the plaintiff appeared and agreed verbally to relinquish the claim for the deferred portion of the dower; that the plaintiff had never since lived with her husband; and that they had inherited no property from Mosad and so were not liable for any dower. The defendants further contended that the divorce having taken place in 1304, the claim for dower was barred by limitation, as it had not been claimed within the statutory period of three years.

The plaintiff filed her plaint on the 15th of February, 1905.

* Appeal from Appellate Decree, No. 542 of 1906, against the decree of F. J. Jeffries, Additional District Judge of Sylhet, dated Dec. 22, 1905, reversing the decree of Mohor Lal Dey, Munsif of Habigunge, dated June 13, 1905.

(1) (1878) I. L. R. 4 Calc. 588. (2) (1905) I. L. R. 30 Bom. 537.

The Court of first instance decreed the suit on the grounds that the *kabin* produced was not disputed by the defendants, and that the story of *talak* and relinquishment was not worthy of credit, because the plaintiff herself was not present at the meeting, in which Mosad Chowdhury was said to have divorced his wife; and that the father had no right to relinquish the dower on behalf of his daughter, who was of full age.

The Additional District Judge, on appeal, held that the plaintiff was divorced in 1304, (1897), and that her right to sue for the dower was therefore barred by limitation; and he accordingly allowed the appeal and dismissed the plaintiff's suit with costs.

The plaintiff appealed to the High Court mainly on the ground that the *talak* having been pronounced in the absence of the wife, the Court below ought to have held that there was no valid divorce under the Mahomedan Law, and that consequently the suit was not barred by limitation.

Babu Bepin Chandra Mallik (with him *Babu Tarakishore Chowdhury*), for the appellant. The main point in the case is whether a divorce can be effected under the Mahomedan Law by uttering the *talak* in the absence of the wife. Sir Roland Wilson, in his Digest of Anglo-Muhammadian Law says that "a divorce may be accomplished by the utterance of any words addressed to the wife clearly indicating an intention to dissolve the marriage"; that shows that the wife must be present: see also Baillie's Digest of Mahomedan Law, page 201. The case of *Furzund Hossein v. Janu Bibi* (1) is an authority in my favour. [STEPHEN J. If the wife runs away what is the husband to do?] He can send her a written divorce. It must be remembered that divorce does not extinguish the right to a deferred dower; it only makes the limitation for an action for dower run from the date when the *talak* is pronounced.

Moulvi Shamsul Huda (with him *Moulvi Nuruddin Ahmed*), for the respondents. The presence of the wife is not necessary,

(1) (1878) I. L. R. 4 Calc. 588.

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when *talak* is pronounced. The absence of the wife only requires that her maintenance is to be paid, until the fact of divorce comes to her knowledge : see Ameer Ali on Mahomedan Law, page 452. The case of *Sherif Saib v. Usana Bibi Ammal* (1) is also in my favour. See also Ballie on Mahomedan Law, page 205.

Babu Bepin Chandra Mallik, in reply. Even, on the assumption that divorce could be effected in the absence of the wife, still as it could not affect the recovery of dower, till it came to the knowledge of the wife, this case should be remanded for a finding whether the wife came to know of it before the period of limitation. The *onus* as to that is upon the defendants, and there is no finding as to the time when the pronouncement of *talak* came to the knowledge of the plaintiff.

STEPHEN AND DOSS JJ. This is a suit in which a woman sues the heirs of a deceased Mahomedan for the deferred portion of the *moharana* provided for by a *kabinnamah*. The defence to the suit was that the woman was divorced in 1304 B.S. or 1897, and that the cause of action accrued at the time of her divorce and that she is therefore Statute-barred under Article 104 of the Limitation Act. To this it is answered that, admitting the facts found by the lower Appellate Court, still no divorce took place. The divorce was by *talak* being pronounced three times, but it was pronounced in the absence of the wife though in the presence of various witnesses including the wife's father.

The first question, which we have to decide, is whether the absence of the wife makes the pronouncement of the *talak* void and inefficacious. In our opinion it does not. The point is dealt with in the book of Mr. Ameer Ali in section 3 of Chapter XII, where he says :—“ It is not necessary for the husband himself to pronounce *talak* in the presence of the wife,

but it is necessary that it should come to her knowledge." The matter is also dealt with in Wilson's Digest at page 164, but not so decisively. It also seems to be the opinion expressed in Nawab Abdur Rahman's Institutes of Mussalman Law. The matter has twice, as far as we are aware, been dealt with by the Courts; in the first place, in the case of *Furzund Hossein v. Janu Bibi* (1) and, secondly, in the case of *Sarabai v. Rabiabai* (2). In the second of these cases a distinct opinion is expressed that it is not necessary for the wife to be present, when the *talak* is pronounced, although this is an *obiter* inasmuch as that case dealt with a written instrument of divorce. In the previous Calcutta case, the matter is also dealt with and the point itself is not directly noticed, but *talak* was there pronounced in the absence of the wife, and it is significant that the case is not decided on that point, which it would have been, if it had been fatal to the effect of the divorce. We therefore hold that it is not necessary for the wife to be present when the *talak* is pronounced. It is necessary certainly for the purpose of dower that the fact of the pronouncement of *talak* should come to her notice. That it came to the notice of the woman there can be no doubt, for before her husband's death she saw him and claimed the dower.

This, however, leads us to the second question as to whether or not the present suit is barred by limitation. The *talak*, as we have said, was pronounced in 1897. The suit was brought in 1905 and the husband died a few months only before the suit. If we count the period of limitation from the time of divorce or from a little later, it is obvious that the suit is Statute-barred. Now, the findings are that the *talak* was pronounced in the presence of witnesses including the woman's father, who took or purported to take a leading part in the proceedings as representing the woman, and the findings also go to show that the woman has been living with her father, apparently continuously, since the time of the divorce. This particular question, when the woman got

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(1) (1878) I. L. R. 4 Calc. 588.

(2) (1905) I. L. R. 30 Bom. 537.

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knowledge of the *taluk*, was not argued in the first instance, and consequently the findings are not as definite on this point as they may be. But on the findings such as they are before us, we have no doubt at all that the woman had notice of the *taluk* anterior to the period of limitation.

The result is that the suit is brought without any foundation, and consequently this appeal must be dismissed with costs.

Appeal dismissed.

B. D. B.

CIVIL RULE.

Before Mr. Justice Coxe and Mr. Justice Doss.

NAGENDRA KUMAR BASU

v.

NABIN MANDAL.*

1908

July 27.

Civil Procedure Code (Act XIV of 1882), ss. 100, 108, 157, 158, 622—Adjourned hearing—Ex parte decree—Revival of case.

Where a suit was decreed *ex parte* on the adjourned day of hearing after taking evidence in the case.

Held, that the order was passed under section 100 read with section 157 of the Civil Procedure Code.

Held, further that the order could be set aside on an application under section 108, of the Civil Procedure Code.

Mariannissa v. Ramkalpa Gorain (1) and *Cooke v. The Equitable Coal Company* (2), followed in principle.

Sitara Begam v. Tulsi Singh (3) distinguished.

CIVIL RULE granted to the plaintiffs Nagendra Kumar Basu and others.

The petitioners brought a suit against the opposite party in the Court of the 2nd Munsif at Basirhat for arrears of *jalkar* rent. On the 22nd January 1907, the date fixed for the hearing of the suit, the case was adjourned to the 5th March 1907 on the application of the opposite party, through their pleaders, to enable them to obtain copies of certain documents from the Judge's Court and the Registration Office of the 24-Parganas and to file written statements. On the 5th March, the defendants neither appeared nor filed written statements, and the suit was decreed. The petitioners executed the said decree in November 1907 and the moveable property of the judgment-debtor was attached on the 17th December 1907.

On the 8th January 1908 the opposite party applied under section 108 of the Civil Procedure Code, to set aside the decree

* Civil Rule No. 1997 of 1908, against the order of the 2nd Munsif of Basirhat, dated 11th April 1908.

(1) (1907) I. L. R. 34 Calc. 235.

(2) (1904) 8 C. W. N. 621.

(3) (1901) I. L. R. 23 All. 462.

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passed by the Munsif on the 5th March 1907 on the ground that no summons were served on them, and that they knew nothing about the suit till their moveable property was attached on the 17th December 1907. This application was registered and the 20th February 1908 was fixed for the hearing of the case under section 108 of the Civil Procedure Code. On that date the case was adjourned to the 21st March for hearing on the application of the opposite party. On the 21st March, the petitioners applied for summonses against their witnesses and the Court ordered the summonses for hearing of the case. On the 11th April 1908, the witnesses not appearing, the petitioners applied for fresh summonses on some of the witnesses. This application was rejected and the Munsif immediately went on with the application under section 108 of the Civil Procedure Code and examined one of the defendants before him in the absence of the pleader for the plaintiffs and ordered that the application be granted and the decree set aside and the case restored for trial.

The plaintiffs thereupon applied to this Court under section 622 of the Civil Procedure Code.

Babu Dwarka Nath Mitter for the petitioners. The order of the Munsif on the 5th March was one under section 158 of the Civil Procedure Code. The Legislature has impressed the character of finality on orders under section 158 and the order of the 5th March could not consequently be reopened. The order of revival was therefore without jurisdiction. *Rangasamy Mudelliar v. Sirangan* (1), *Anantharama Patter v. Madhava Paniker* (2). Section 157 of the Code makes the provisions of section 108 of the Code (Chapter VII) applicable to orders under that section. But there is no such provision in regard to orders under section 158, which are final. The observations of the learned Judges in *Mariannissa v. Ramkalpa Gorain* (3) support my contention. The words "proceed to decide the suit forthwith" does not exclude the taking of evidence: *Sitara Begam v. Tulshi Singh* (4). Lastly, assuming that the

(1) (1869) 4 Mad. H. C. 254.

(3) (1907) I. L. R. 34 Calc. 235.

(2) (1881) I. L. R. 3 Mad. 264.

(4) (1901) I. L. R. 23 All. 462.

Munsif had no jurisdiction to set aside the order, unless "sufficient cause" was shown, there is not a word in the judgment to indicate that he was satisfied that there was sufficient cause.

COXE AND DOSS JJ. In this case the plaintiffs on the 19th December 1906 brought a suit against the defendants in the Court of the Munsif of Basirhat. The 22nd January was fixed for the hearing of the case. On that date the defendant prayed for time and the case was adjourned to the 19th February. The 19th February being a holiday the case was taken up on the 25th February, when it was again adjourned to the 5th March. On the 5th March the following order was passed: "The defendants do not appear; examined Kali Krishna Chandra and decreed *ex parte*." Subsequently the defendants applied to have this decree set aside under section 108 of the Civil Procedure Code, and that application was ultimately granted.

The plaintiffs now apply to this Court under section 622 of the Code of Civil Procedure, and ask that the order of the Munsif reviving the case may be set aside on two grounds. The first ground is that the order of the 5th March 1907 is really an order under section 158 of the Code of Civil Procedure and therefore cannot be set aside on an application under section 108 of the Code of Civil Procedure. It appears to us that the case is completely governed by the general principles laid down in the cases of *Mariannissa v. Ramkalpa Gorain* (1) and *G. P. Cooke v. The Equitable Coal Company* (2). It seems to us that the Court did not, as a matter of fact, on the 5th March 1907, dispose of the case under section 158 of the Code of Civil Procedure. That section authorises the Court to proceed to decide a suit forthwith. But in this case the Court did not decide the case forthwith, but proceeded to take evidence and decided the case on the evidence so taken. We have been referred to the case of *Sitara Begam v. Tulshi Singh* (3) as an authority for the proposition that the Court may under section

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(2) (1904) 8 C. W. N. 621.

(3) (1901) I. L. R. 23 All. 462.

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158 of the Code of Civil Procedure, take further evidence and decide the case on that evidence. But after reading the decision we do not think that this conclusion follows necessarily from the terms of the judgment. We think, therefore, that the first point fails, and hold that the order of the 5th March 1907 was passed under section 100 read with section 157 of the Civil Procedure Code, and could be set aside by an application under section 108.

The second point taken is that the order of the Munsif reviving the case is bad under section 108 of the Code of Civil Procedure, inasmuch as the Munsif has not found that the defendants were prevented by sufficient cause from appearing on the day fixed. It is impossible to deny that the enquiry made by the Munsif into the matter was perfunctory and the order passed very defective and irregular in form. But it appears on examining the proceedings that that order was an *ex parte* order. The case under section 108 was taken up on the 20th February, 21st March and the 11th April. On none of these days were the plaintiffs ready to proceed with the case. The order of the 21st March directed the issue of summonses on the plaintiffs' witnesses at their own risk and so conveyed to them a fair warning that further time would not be given. Then on the 11th April the plaintiffs applied for further time and their application being refused, one of the defendants was examined. The plaintiffs apparently did not cross-examine him and acting on the statement of one of the defendants that he had never heard of the decree, until it was executed, the Munsiff directed the restoration of the suit and a trial *de novo*. Although, as we have said, we cannot regard the order of the Munsif as in form a proper order, yet we do not think that we ought, in the exercise of the discretion given us by section 622 of the Code of Civil Procedure, to interfere with it.

The result is that this Rule is discharged with costs.

Rule discharged.

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Holmwood.

GURDEO SINGH

v.

CHANDRIKAH SINGH

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v.

RASHBEHARY SINGH.*

1907

April 10.

Jurisdiction—Retransfer—District Judge—Civil Procedure Code (Act XIV of 1882), ss. 13 and 25—The Bengal, N.-W. P. and Assam Civil Courts Act (XII of 1887), ss. 9 and 18—Inherent power—Waiver of jurisdiction—Res judicata—Mortgage, subrogation of—Compromise decree, when binding.

A suit was instituted originally in the Court of the second Subordinate Judge; the District Judge transferred the case to his own Court acting in the exercise of the powers conferred on him by section 25 of the Code of Civil Procedure (Act XIV of 1882). Subsequently, the District Judge transferred the case to the first Subordinate Judge as he himself was about to proceed on leave. The case was tried by him and no objection was taken by either party to the effect that the Subordinate Judge had no jurisdiction to try the case. On an objection taken as to the want of jurisdiction.

Held that, inasmuch as under section 9 of Act XII of 1887 the District Judge had administrative control over all the Civil Courts within the local limits of his jurisdiction, he had inherent power to transfer the case from his own Court to that of a Subordinate Judge, especially when the order was for the obvious benefit of the litigants and for the speedy determination of the matter.

Held further, that under section 18 of Act XII of 1887, the Subordinate Judge unquestionably possessed jurisdiction over the subject-matter of the litigation, and that therefore the case was not one of absolute want of jurisdiction, but was at best an irregular assumption of jurisdiction; and as no objection at an earlier stage of the proceedings was taken by the defendants appellants, they waived their right to take exception to the power of the Subordinate Judge to try the cause under authority of an order of transfer made by the District Judge.

* Appeals from Original Decrees Nos. 540 and 566 of 1904, against the decrees of Babu Sashi Bhusan Chowdhry, Subordinate Judge of Shahabad, dated August 18, 1904.

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To determine the question of *res judicata*, it is essential to ascertain what were the rights in dispute between the parties, and what were alleged between them, and this must be done not merely from the decree, but also from the pleadings and judgment.

Surjiram Marwari v. Barhamdeo Persad (1) and *Magniram v. Mehdi Hossein Khan* (2), referred to.

In a suit to enforce a second mortgage, the first mortgagee is not a necessary party.

Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, there must be an adjudication, and in such a case the adjudication will be *res judicata* between the defendants as well as between the plaintiff and the defendants; but for this there must be a conflict of interest amongst the defendants and the judgment must define the real rights and obligations of the defendants *inter se*.

Magniram v. Mehdi Hossein Khan (2), *Chajju v. Umrao Singh* (3), *Balamhat v. Narayan Bhat* (4), *Muhammad Kuni Rowthan v. Visvanathaiyar* (5) and *Cottingham v. Earl of Shrewsbury* (6), referred to.

To entitle one to invoke the equitable right of subrogation, he must either occupy the position of a surety of the debt or must have made the payment under an agreement with the debtor or creditor that he should receive and hold an assignment of the debt as security, or he must stand in such a relation to the mortgaged premises that his interest cannot otherwise be adequately protected.

The doctrine of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation, being under no obligation to make the payment and not being compelled to do so for the preservation of any rights or property of his own.

Subrogation is by redemption, and, unless there is redemption, no subrogation can take place.

Where, therefore, sums paid by a subsequent mortgagee were applied only in part satisfaction of the claim for interest due upon earlier bonds, a claim for subrogation could not arise. The rule is, that before one creditor can be subrogated to the rights of another, the demand of the latter must be entirely satisfied so that he shall be relieved from all further trouble, risk and expense.

Merritt v. Hosmer (7), *Street v. Beal* (8), *O'Reilly v. Holt* (9), *Carter v. Neal* (10) and *Hollingworth v. Floyd* (11), referred to.

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| (1) (1905) 1 C. L. J. 337. | (8) (1864) 16 Iowa 68; 85 Am. Dec. 504. |
| (2) (1903) I. L. R. 31 Calc. 95. | (9) (1877) 4 Woods C. C. 645; 18 Fed. Cases 792. |
| (3) (1900) I. L. R. 22 All. 386. | (10) (1858) 24 Georgia 346; 71 Am. Dec. 136. |
| (4) (1900) I. L. R. 25 Bom. 74. | (11) (1807) 2 Harris & Gill (Maryland) 91. |
| (5) (1902) I. L. R. 26 Mad. 337. | |
| (6) (1843) 3 Hare 627. | |
| (7) (1858) 11 Gray 276; 71 Am. Dec. 713. | |

A petition of compromise, in so far as it relates to properties in suit, does not require registration under section 17 of the Registration Act (III of 1877), and the decree, in so far as it gives effect to the settlement touching such properties, operates as *res judicata*. If it gives effect to the settlement touching properties extraneous to the litigation, the decree is to that extent without jurisdiction and is inoperative. In relation to these extraneous properties, the parties must fall back upon the petition itself, which cannot without registration effectively declare or create a title to immoveable property exceeding one hundred rupees in value.

Pranal Anni v. Lakshmi Anni (1), *Muthayya v. Venkataratnam* (2), *Bir-bhadra Rath v. Kalpataru Panda* (3), *Kali Charan Ghosal v. Ram Chandra Mandal* (4), *Patha v. Esup* (5) and *Achutaramraja v. Subbaraju* (6), referred to.

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APPEALS by the defendants 5 to 7 and the plaintiffs respectively.

THIS appeal arose out of a suit brought by the plaintiffs to enforce a deed of mortgage dated the 23rd of November 1866. The bond was executed by the defendants Nos. 1 to 4 in favor of defendant No. 14. The properties comprised in the bond were Mehal Raipur Chur, which included the villages Raipur Khas, Kachnath and Burkavi. On the 1st of February 1898, the plaintiffs purchased the rights under the security of 1886, and they brought the present suit to enforce their mortgage on the 15th of June 1900, against the mortgagors and also some encumbrancers, who have enforced their security against the said mortgagors. It appeared that on the 15th of December 1884, defendants Nos. 1 to 4 executed a mortgage bond in favor of defendants 5 to 8 in respect of a share of Mehal Raipur Chur. On the 31st of May 1894, the mortgagees brought a suit against the mortgagors making the mortgagees of 1886 a party defendant to the suit. On the 21st of March 1895, the suit was decreed against the mortgagors, but was dismissed against the mortgagees of 1886.

(1) (1899) L. R. 26 I. A. 101 ; I. L. R. (3) (1905) 1 C. L. J. 388.

22 Mad. 508.

(4) (1903) I. L. R. 30 Calc. 783.

(2) (1901) I. L. R. 25 Mad. 553.

(5) (1906) I. L. R. 29 Mad. 365.

(6) (1901) I. L. R. 25 Mad. 7.

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In execution of their decrees the mortgagees purchased the property comprised in their security. On the 5th of May 1887, they executed another mortgage bond in favour of defendants 5 to 8 mortgaging a share of Raipur Chur and another village. On the 31st May 1894, the mortgagees sued to enforce their securities against the mortgagors and also against the mortgagee of 1886. On the 21st of May 1895, the suit was decreed against the mortgagors, but dismissed against the predecessor-in-title of the plaintiffs. In execution of the decree the mortgagees purchased the property included in their security. On the 29th of March and 2nd of June 1895, the defendants Nos. 1 to 4 excluded two mortgages in favor of defendants 9 to 12; the properties comprised in the security were shares of Mehal Raipur Chur, which included Kachnath and Burkavi. In 1899 the mortgagees brought a suit to enforce their mortgage against the mortgagors making also defendants Nos. 5 to 8, No. 14 and the present 2nd plaintiff, who took a conveyance from the mortgagees of 1886 for the benefit of himself and the other plaintiff, as party defendants. On the 8th April 1900, the mortgagees obtained a decree, which reserved in favor of defendants Nos. 5 to 8 a declaration of priority not merely in respect of their bond of 1884, but also with regard to a certain sum out of the debt due to them under the bond of 1887. The decree, however directed that the mortgagors should proceed in the first instance against properties other than Mouzah Raipur Chur. On the 23rd of November 1900, the mortgagees in execution of the decree purchased Kachnath and Burkavi in partial satisfaction of their dues.

The suit was defended by the defendants Nos. 5 to 8 and the defendants Nos. 9 to 12, on the ground that the bond of 1886 executed in favour of the predecessor in interest of the plaintiffs was not a *bona fide* document, and the plaintiffs were not entitled to sell the properties, which the defendants had already sold in execution of their mortgage decrees.

The learned Subordinate Judge passed the usual mortgage decree in favor of the plaintiffs for Rs. 9,121, and directed if

the decretal amount is not paid within three months, the mortgaged property, Mouzah Raipur Chur, is to be sold subject to the prior mortgage charge of defendants Nos. 5 to 8, and subject to the charge of the remaining decretal money of defendants Nos. 9 to 12.

Against this decree defendants Nos. 5 to 7 preferred appeal No. 540 of 1904, the plaintiffs preferred appeal No. 566 of 1904, and a memorandum of cross objection was filed on behalf of defendants Nos. 9 to 12.

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Babu Raghunandan Prasad and Babu Raghunath Singh for the appellants in No. 540.

Dr. Rash Behari Ghose, Babu Umakali Mookerjee, Babu Jogendra Chandra Ghose, Babu Mohendra Nath Roy and Moulvie Mahomed Habibullah for the respondents.

Dr. Rash Behari Ghose, Babu Umakali Mookerjee, Babu Jogendra Chandra Ghose and Babu Kulwant Sahay for the appellants in No. 566.

Babu Mohendra Nath Roy, Babu Raghunandan Prasad and Moulvie Mahomed Habibullah for the respondents.

Cur. adv. vult.

MOOKERJEE J. The circumstances, which gave rise to the litigation out of which the present appeals arise are in some measure complicated, but although they were in controversy between the parties in the Court below, the facts found by the Subordinate Judge have not been challenged before us. These facts, in so far as it is necessary to state them for the disposal of the questions of law raised in the two appeals, may be briefly stated. On the 23rd November 1886, the first four defendants in the present suit executed a mortgage in favour of the father of defendant No. 14. The property comprised in the security consisted of a share in Mehal Raipur Chur,

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which included three villages, Raipur Khas, Kachnath and Burkavi. The mortgagors undertook to repay the loan on the 13th June 1889. Subsequently, on the 1st February 1898, the plaintiffs purchased from the mortgagee his rights under the security of 1886, and, on the 15th June 1900, commenced the present action to enforce them. The defendants, against whom relief is claimed or who are sought to be bound by the decree in the present litigation, may be divided into three groups. The first four defendants are the mortgagors; the next four are some encumbrancers, who have enforced their securities as against the mortgagors; and the third set of four defendants are other encumbrancers similarly situated.

The transactions, by which these two sets of defendants claim to have acquired an interest in the properties included in the mortgage, which is the foundation of the title of the plaintiffs, appear to be as follows. On the 15th December 1884, the first four defendants executed a mortgage in favour of defendants 5 to 8 in respect of a share of Mehal Raipur Chur. On the 31st May, 1894, the mortgagees sued to enforce their security, and joined as parties defendants, not only their mortgagors, but also the predecessor in interest of the present plaintiffs, namely, the mortgagee of 1886. On the 21st March 1895, the mortgagees obtained a decree as against their mortgagors, but their claim was dismissed as against the mortgagee of 1886. Subsequently, they executed this decree and became purchasers of the property comprised in their security. On the 5th May 1887, the first four defendants executed a mortgage in favour of defendants 5 to 8 and the properties comprised in this security were shares in Mehal Raipur Chur and another property by name Chandharwa. On the 31st May 1894, the mortgagees sued to enforce their security, and joined as parties defendants their mortgagors, as also the mortgagee of 1886. On the 21st March 1895, the suit was decreed as against the mortgagors, but was dismissed as against the predecessor in title of the present plaintiffs. Subsequently, they executed their decree and became purchasers of the properties comprised in their security.

On the 29th March and 2nd June 1885, the first four defendants executed two mortgages in favour of defendants 9 to 12. The properties comprised in these securities were shares of Mehal Raipur Chur, which included Kachnath and Burkavi. In 1899 the mortgagees brought a suit to enforce their security and joined as parties defendants, not only their mortgagors, but also defendants 5 to 8, that is, the mortgagees of 1884 and 1887, defendant 14, that is, the mortgagee of 1886, and the present second plaintiff, who had taken a conveyance from the mortgagee of 1886 for the benefit of himself and the other plaintiff. On the 5th April 1900, the mortgagees obtained a decree, which reserved in favour of defendants 5 to 8 a declaration of priority, not merely in respect of their bond of 1884, but also with regard to a sum of Rs. 1,172 out of the debt due to them under their bond of 1887. The decree, however, directed that the mortgagees should proceed in the first instance against properties other than Mehal Raipur Chur. On the 23rd November 1900, the mortgagees enforced their decree and purchased Kachnath and Burkavi in partial satisfaction of their dues. This did not, however, affect their right to proceed against Raipur Chur for the realization of the remainder of their dues under their mortgage decree.

In the present case the claim of the plaintiffs under the mortgage of 1886 has been resisted substantially by the two sets of defendants, whom we have described as defendants 5 to 8 and defendants 9 to 12, and the principal point in controversy between the parties is as to the manner in which their respective rights under the different mortgages and execution sales are to be regulated. The learned Subordinate Judge has made the usual mortgage decree in favour of the plaintiffs for Rs. 9,121, and has directed that, if the decretal money is not paid within three months, the mortgaged property Mehal Raipur Chur is to be sold subject to the prior mortgage charge of defendants 5 to 8 and subject to the charge of the remaining decretal money of defendants 9 to 12, so that the purchaser at the auction sale will have to pay up the mortgage lien of defendants

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5 to 8 and the balance of the judgment debt due to defendants 9 to 12. Against this decree, objection has been taken by all the parties interested. Defendants 5 to 7 have preferred Appeal No. 540 of 1904. The plaintiffs have preferred Appeal No. 566 of 1904 and a memorandum of cross-objection has been presented on behalf of defendants 9 to 12.

On behalf of defendants 5 to 7 the judgment of the lower Court has been assailed substantially on four grounds, namely, *first*, that the Subordinate Judge had no jurisdiction to hear the case; *secondly*, that the decrees obtained by these defendants on the basis of their mortgages of 1884 and 1887 operate as *res judicata*, so that the plaintiffs are not entitled to enforce their security as against the properties purchased by the appellants in execution of the two decrees obtained by them; *thirdly*, that the appellants are entitled to priority over the mortgage of the plaintiffs, not only in respect of their mortgage of 1884, but also in respect of the sum of Rs. 1,952, which formed part of the consideration of their mortgage of 1887; and *fourthly*, that the plaintiffs are not entitled to interest upon their security at the rate claimed, as they had subsequently entered into a valid compromise by which they undertook to reduce the rate of interest.

On behalf of the plaintiffs, the decision of the Subordinate Judge has been challenged substantially on two grounds, namely, *first*, that the decisions in the suits commenced by the mortgagees of 1884 and 1887 to enforce their securities, which were ultimately dismissed as against the predecessor in interest of the plaintiffs, operate as *res judicata*, and that consequently the plaintiffs are entitled to enforce their security precisely in the same manner as if the mortgages of 1884 and 1887 had never been created; and *secondly*, that defendants 5 to 8 and 9 to 12 are bound to render an account of the profits of the property, of which they have taken possession as purchasers at the sales held in execution of their decrees. On behalf of defendants 9 to 12 the decision of the Subordinate Judge has been challenged on the ground that they are entitled to their costs of the litigation from the plaintiffs, whose claim has substantially

failed as against them. We shall first take up the points raised in the appeal of the defendants 5 to 7; but as the question of *res judicata* is raised by these defendants as also by the plaintiffs, it will be convenient, if we discuss this question from the points of view of both the parties.

The *first* ground taken on behalf of defendants 5 to 7 raises the question of the jurisdiction of the Subordinate Judge to entertain this suit. The circumstances, so far as it is necessary to state them for the elucidation of this point, appear to be as follows:—The present action was commenced on the 15th June 1900, and it was originally instituted in the Court of the second Subordinate Judge of Shahabad. On the 22nd June 1901, the District Judge transferred the case to his own Court, and it may be presumed that he acted in exercise of the powers conferred upon him by section 25 of the Code of Civil Procedure. On the 24th June following, the suit was dismissed by the District Judge for want of prosecution. The plaintiffs appealed to this Court, and on the 25th February 1904, a Division Bench allowed the appeal and sent back the case to the District Judge for rehearing. After the records had been remitted to the District Judge, the case remained pending in his Court from the 7th June to the 25th June 1904. On the latter date, the District Judge transferred the case to the first Subordinate Judge as he himself was about to proceed on leave. On the 28th June, the case was received by the Subordinate Judge, and the trial lasted from the 28th July to the 18th August 1904. No objection was taken by either party to the effect that the Subordinate Judge had no jurisdiction to try the case. It is now contended, however, that the Subordinate Judge had no jurisdiction, and, as the question is one of jurisdiction, we have allowed the appellants to take it, although it had not been suggested at any earlier stage of the proceedings. The ground, upon which the objection is founded, is that although under section 25 of the Code of Civil Procedure a District Court has power to withdraw any suit pending in a Court of first instance subordinate to it and to try the suit itself or transfer it for trial to any other Subordinate Court competent to try it, the Dis-

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strict Court has no power, after it has withdrawn a suit and placed it on the files, to transfer it to any Subordinate Court. In support of this position, reliance has been placed upon the cases of *Ram Charittar Roy v. Bidhata Roy* (1) and *Sita Ram v. Nauni Dulaiya* (2).

It has been argued, on the other hand, by the learned vakil for the appellants respondents that there are at least three answers to the contention of the appellants, namely, *first*, that the District Judge had inherent power, apart from the provisions of section 25 of the Code of Civil Procedure, to transfer a suit from his Court to that of the Subordinate Judge; *secondly*, that if he did not possess such power, the Subordinate Judge has not acted without jurisdiction, but has at best assumed jurisdiction in an irregular manner, and that consequently the defendants, who had acquiesced in the exercise of such jurisdiction, ought not to be permitted now to question the legality of the proceedings before the lower Court; and *thirdly*, that the defect, if any, is cured by section 578 of the Code of Civil Procedure, inasmuch as the order of transfer might undoubtedly have been made by this Court, if not by the District Court, and that, if any objection had been taken in time before the Subordinate Judge, the plaintiffs might also have avoided the defect by the presentation of a new plaint, as no question of limitation could possibly arise upon the admitted facts of the case. In our opinion the contention of the learned vakil for the plaintiffs respondents furnishes, in each of its three branches, a complete and conclusive answer to the plea of want of jurisdiction advanced by the appellants. The case of *Ram Charittar Roy v. Bidhata Roy* (1) is, no doubt, an authority for the proposition that, when once a District Judge withdraws a suit to his own file for trial, he is not competent, under section 25 of the Civil Procedure Code, to retransfer it to the Court from which the case had been withdrawn. The case of *Sita Ram v. Nauni Dulaiya* (2) appears to go still further, as the learned Judges held that section 25 has no application to a case remanded

(1) (1906) 10 C. W. N. 902.

(2) (1899) I. L. R. 21 All. 230.

under section 562. The cases of *Sakharam v. Gangaram* (1), *Amir Begum v. Prahlad Das* (2) and *Nundan Prasad v. W. C. Kenney* (3) also support the view that, where a District Judge has once exercised the powers conferred by section 25 of the Civil Procedure Code and transferred a case to his own Court from that of the Subordinate Judge, he cannot afterwards retransfer such case.

In these cases, however, the Court was not invited to consider whether, apart from the provisions of section 25 of the Civil Procedure Code, the District Court may not have authority to make an order of the description now in question before us. In our opinion, there is considerable force in the contention of the learned vakil for the plaintiffs respondents that as under section 9 of Act XII of 1887, the District Judge has administrative control over all the Civil Courts within the local limits of his jurisdiction, it ought to be held that the District Judge has inherent power to transfer a case from his own Court to that of the Subordinate Judge, specially when, as in the present instance, the order was made for the obvious benefit of the litigants and for the speedy determination of the matter. It has been ruled by this Court, in the cases of *Panchanan Singha Roy v. Dwarka Nath Roy* (4) and *Hukum Chand Boid v. Kamalanand Singh* (5), that the Code of Civil Procedure was not intended to be, and is not, exhaustive. As was observed in the case of *Rasik Lal Datta v. Bidhumukhi Dasi* (6), the Code does not affect the power and duty of the Court in cases where no specific rule exists, and the Court should act according to equity, justice and good conscience, though in the exercise of such power it must be careful to see that its decision is based on sound general principles and is not in conflict with them or the intention of the legislature.

We agree entirely with the view indicated in the cases mentioned that the Courts in this country have, in matters of procedure, powers beyond those which are expressly

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(1) (1899) I. L. R. 13 Bom. 654.

(2) (1902) I. L. R. 24 All. 304.

(3) (1902) I. L. R. 24 All. 356.

(4) (1905) 3 C. L. J. 29.

(5) (1905) I. L. R. 33 Calc. 927; 3 C.

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(6) (1906) I. L. R. 33 Calc. 1094; 4 C.

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given by the Code of Civil Procedure, which binds Courts only in so far as it goes ; the powers of the Court are not rigidly circumscribed by the provisions of the Code, and it is not possible to maintain the theory that the Court has no power to make a particular order, though it may be absolutely essential in the interests of justice, unless some section of the Code can be pointed out as a direct authority for it. We are not unmindful that there are, perhaps, observations in the case of *Bidya Moyee Debye Chowdhurani v. Surja Kanta Acharji* (1), which may, at first sight, appear to militate against this view, and may lend some colour of support to the contention that a District Judge has no inherent power to transfer a case either from his own Court or from that of an officer under his administrative control, and that the power must be one conferred by Statute. The circumstances of that case, however, were of an entirely different description, and it was not intended there to decide the question, which has been raised before us.

We are, therefore, disposed to hold that the District Judge had power, under the circumstances disclosed in the order-sheet, to make the order of transfer, which he did ; and we arrive at this conclusion without hesitation, as the result of our view undoubtedly accords with what has been for many years past the well-established practice. We may further point out that, as was laid down by their Lordships of the Judicial Committee in the case of *Syud Tuffuzzool v. Rughoo Nath* (2), to proceed to recall and cancel an invalid order is not simply permitted to, but is the duty of a Judge, who should always be vigilant not to allow the act of the Court itself to do wrong to the suitor ; see also *Hiralal Mukerji v. Premamoyee Debi* (3), where the application of this principle is explained. We are unable to appreciate why this principle should not be applied to the case before us. If the District Judge, who has transferred a case to his Court, discovers that the very object, with which the case was transferred, is likely to fail by reason of unforeseen circumstances, it would be unreasonable

(1) (1905) I. L. R. 32 Calc. 875.

(2) (1871) 14 Moo I. A. 40, 51.

(3) (1905) 2 C. L. J. 306, 309.

to hold that it is not competent to him to withdraw the order and restore the case to the Court of the Subordinate Judge.

But it is not necessary to rest our decision on this ground alone, because the second and third branches of the contention of the plaintiffs respondents appear to us to be unanswerable. It was contended by the learned vakil for the respondents that, assuming that the District Judge had no power under the law to transfer a case from his Court to that of the Subordinate Judge, this does not really affect the jurisdiction of the latter officer. Under section 18 of Act XII of 1887, the Subordinate Judge unquestionably possessed jurisdiction over the subject matter of the litigation. The only suggestion, which can be plausibly made, is that he assumed that jurisdiction in an irregular manner. The case, therefore, is not one of absolute want of jurisdiction, but is at best of an irregular assumption of jurisdiction. It was argued on behalf of the respondents that, in such a case as this, the appellants, who had never taken this objection at an earlier stage of the proceedings, were precluded from raising the question now.

In our opinion, this distinction is well founded on principle and is amply supported by authority. In *Ledgard v. Bull* (1), their Lordships of the Judicial Committee pointed out that, although jurisdiction cannot be conferred by consent where there is an entire absence of jurisdiction, in a case where the Court is competent to entertain the suit, if it were competently brought, the defendant may be barred by his own conduct from objecting to the irregularities in the institution of the suit; and, further, that when a Judge has no inherent jurisdiction over the subject matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbitrator and be bound by his decision on the merits, when these are submitted to him. There are numerous authorities, which establish that, when in a cause which the Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute

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his jurisdiction upon the ground that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit. To the same effect are the observations of their Lordships in the case of *Meenakshi Naidoo v. Subramanya Sastri* (1), where their Lordships affirmed the view taken in *Ledgard v. Bull* (2) and pointed out that a waiver of a right to complain for want of jurisdiction is inapplicable only if there is an inherent incompetency in the Court to deal with the question brought before it, and that no consent can confer upon a Court that jurisdiction, which it never possessed. This distinction between an absolute want of jurisdiction and an irregular assumption of jurisdiction has, sometimes, been overlooked.

But the foundation of the distinction is fully explained in the Order of Reference to a Full Bench in the cases of *Sukh Lal Sheikh v. Tara Chand Ta* (3) and *Khosh Mahomed Sirkar v. Nazir Mahomed* (4). In the first of these cases, it was pointed out that jurisdiction may be defined to be the power of a Court to hear and determine a cause, to adjudicate or exercise any judicial power in relation to it, *Rhode Island v. Massachusetts* (5). Such jurisdiction naturally divides itself into three broad heads, namely, with reference to (1) the subject matter, (2) the parties, (3) the particular question which calls for decision, Black on Judgments, section 215.

A Court cannot adjudicate upon a subject matter, which does not fall within its province as defined or limited by law ; this jurisdiction may be regarded to be essential, for jurisdiction over the subject matter is a condition precedent to the acquisition of authority over the parties, and, if a Court has no jurisdiction over the subject matter of the controversy, consent of the parties cannot confer such jurisdiction, and a judgment made without jurisdiction in such a case is absolutely null and void ; it may be set aside by review or appeal, or its

(1) (1887) L. R. 14 I. A. 160 ; I. L. R. (3) (1905) I. L. R. 33 Calc. 68 ; 2 C. 11 Mad. 26. L. J. 241.

(2) (1886) L. R. 13 I. A. 134 ; I. L. R. (4) (1905) I. L. R. 33 Calc. 352 ; 3 9 All. 191. C. L. J. 259.

(5) (1838) 12 Peters U. S. 657.

nullity may be established, when it is sought to be relied upon in some other proceeding : See Hawes on Jurisdiction, pages 12-16 ; Hermann on Estoppel, section 110, and *Frankel v. Sutherland* (1).

An entirely different class of questions, however, arises, when it is suggested that a Court in the exercise of the jurisdiction which it possesses, has not acted according to the mode prescribed by the Statute. If such a question is raised, it relates obviously, not to the existence of jurisdiction, but to the exercise of it in an irregular or illegal manner. This distinction between elements, which are essential for the foundation of jurisdiction and the mode in which such jurisdiction has to be assumed and exercised, is of fundamental importance, but has not always been sufficiently recognised. That the distinction is well-founded is manifest from cases of high authority. Thus, in *Pisani v. Attorney-General of Gibraltar* (2), their Lordships of the Judicial Committee held that, where there is jurisdiction over the subject matter, but non-compliance with the procedure prescribed as essential for the exercise of jurisdiction, the defect might be waived. The same principle was adopted in *Ex parte Pratt* (3) and *Ex parte May* (4), which are authorities for the proposition that where jurisdiction over the subject matter exists requiring only to be invoked in the right way, the party, who has invited or allowed the Court to exercise it in a wrong way, cannot afterwards turn round and challenge the legality of the proceedings due to his own invitation or negligence ; see *Vishnu Sakharam Nagarkar v. Krishna Rao Malhar* (5). Although the objection that a Court is not given jurisdiction over the subject matter by law, cannot be waived, *Golab Sao v. Chowdhury Madho Lal* (6), yet defects of jurisdiction arising from irregularities in the commencement of the proceedings, may be waived by the failure to take objection at the proper stage of the proceedings ;

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(1) (1890) 19 Atlantic Rep. 898.

(2) (1874) L. R. 5 P. C. 515.

(3) (1884) 12 Q. B. D. 334.

(4) (1884) 12 Q. B. D. 497.

(5) (1886) I. L. R. 11 Bom. 153.

(6) (1905) 2 C. L. J. 384 ; 9 C. W. N.

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To put the matter from another point of view, it is only when a Judge or Court has no jurisdiction over the subject-matter of the proceeding or action in which an order is made or a judgment rendered, that such order or judgment is wholly void, and that the maxim applies that consent cannot give jurisdiction; in all other cases, this objection to the exercise of the jurisdiction may be waived, and is waived when not taken at the time the exercise of the jurisdiction is first claimed, *Hobart v. Frost* (4); Black on Judgments, section 217.

On this ground, we must hold, as regards the second branch of the contention of the respondents, that the defendants have waived their right to take exception to the power of the Subordinate Judge to try the cause under authority of an order of transfer made by the District Judge. As regards the third branch of the contention of the respondents, namely, that the objection is entirely devoid of all substance, it is manifest from other considerations. It cannot be disputed that the order of transfer might have been made by the High Court. If, therefore, objection had been taken by the defendants either at the time, when the District Judge made his order or at the time when the Subordinate Judge dealt with the case on the merits, it would have been open to the plaintiffs to obtain an order from this Court, which would have cured the defect. It may further be pointed out that, if the objection had been taken at the time, it would have been open to the plaintiffs to present even a new plaint to the Subordinate Judge. Indeed, if the suit be assumed to have been instituted on the day when the Subordinate Judge took cognizance of it, it would not be open to objection on the ground of limitation, because, although the due date upon the bond expired on the 13th June 1889, the liability of the mortgagors was kept alive by acknowledgment made within twelve years from the date of the present suit. From every point of view, therefore, it

(1) (1878) 98 U. S. 476.

(2) (1838) 12 Peters U. S. 309.

(3) (1838) 21 Peters U. S. 657, 718.

(4) (1856) 5 Duer N. Y. 672.

follows that the appellants are precluded from questioning, at the present stage, the validity of the proceedings before the Subordinate Judge. The first ground taken on behalf of the defendants 5 to 7 consequently fails and must be overruled.

The second ground taken on behalf of defendants 5 to 7 involves the question of *res judicata*, and the first ground taken on behalf of the plaintiff raises precisely the same question. But, although the parties are agreed that the decisions in the litigations of 1894 upon the mortgages of 1884 and 1887 operate as *res judicata*, they are not agreed as to the precise effect of those decisions. Defendants 5 to 7 contend that the effect is to preclude the plaintiffs from enforcing their mortgage against the properties purchased by the decree-holders mortgagees in the suits of 1894. The plaintiffs assert, on the other hand, that the effect is to preclude defendants 5 to 7 from setting up their mortgages and thus to place the plaintiffs in the position, which they would have occupied, if the mortgages of 1884 and 1887 had never been created. To determine which of these contentions ought to prevail, we have to examine the circumstances of these two litigations; for as was pointed out by this Court, in the cases of *Surjiram Marwari v. Barhamdeo Persad* (1) and *Magniram v. Mehdi Hossein Khan* (2), to determine the question of *res judicata*, it is essential to ascertain what were the rights in dispute between the parties and what were alleged between them, and this must be done, not merely from the decree, but also from the pleadings and judgment.

Now, it appears that defendants 5 to 8 commenced suit No. 22 of 1884 to enforce their mortgage of the 15th December 1884, and they instituted suit No. 21 of 1894 to enforce their security of the 5th May 1887. In each of these suits they joined as parties defendants, not merely their mortgagors, who are now defendants 1 to 4, but also defendant No. 14, who is the mortgagee of 1886 and is the predecessor in title of the present plaintiffs. It will be observed that in the suit to enforce the security of 1884, the mortgagee of 1886 was a necessary party, and an examina-

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tion of the plaint in that case shows that he was brought on the record as a puisne encumbrancer interested in the mortgaged premises. He filed a written statement in which he challenged the validity of the plaintiff's mortgage and alleged that it was fraudulent and without consideration. He further pleaded that the plaintiffs had no valid cause of action as against him. Upon these pleadings, issues were raised, one of which was, whether the bond was genuine and *bona fide*, and another was, whether the plaintiffs had any cause of action against that defendant. The Subordinate Judge, who tried the case, found that neither party had proved that this particular defendant was in any way interested in the mortgaged property. He also held that the evidence adduced to establish the payment of consideration for the mortgage was not satisfactory or reliable, and that the admission of the mortgagors that they had received the sum alleged to have been advanced was no evidence against the other defendants.

In this view of the matter, the Court dismissed the suit against the mortgagee of 1886, but made a decree against the mortgagors, as they had confessed judgment. The decree directed the sale of the mortgaged property only in so far as the mortgagors were concerned. As we have already stated, the mortgagees decree-holders subsequently executed this decree and purchased the property at the execution sale. As regards the mortgage of 1887, the mortgagees, the present defendants 5 to 8, commenced their suit against the mortgagors and the mortgagee of 1886. An examination of the plaint shows that it does not disclose any cause of action against the mortgagee of 1886. It will be observed that the mortgagee of 1866 was not a necessary party to enforce the mortgage of 1887; for, as was explained by this Court in the case of *Surjiram Marwari v. Barhamdeo Persad* (1) in a suit to enforce a second mortgage, the first mortgagee is not a necessary party. No doubt in one of the paragraphs of the plaint it was alleged that a portion of the consideration money for the mortgage of 1887, namely, Rs. 1,952, had been applied

(1) (1905) 1 C. L. J. 337, 351.

in satisfaction of interest due upon earlier bonds of the 15th December 1884, the 29th March 1885, and the 2nd June 1885; but there was no express prayer that in respect of this sum, the mortgage, though of 1887, might be treated as entitled to priority over the mortgage of 1886. The mortgagee of 1886 defended the suit on the ground that there was no valid cause of action as against him, and also asserted that the mortgage bond, on which the claim was founded, was collusive and without consideration. Upon these pleadings, the Subordinate Judge framed issues, one of which was, whether the bond in suit was genuine and *bona fide*, and another was, whether the plaintiffs had any cause of action against the mortgagee of 1886. There was no issue raised as to whether the bond of 1887, if genuine, was, in respect of a portion of the consideration money, entitled to priority over the bond of 1886. The Subordinate Judge found upon the evidence that there was nothing to show whether the alleged mortgagee of 1886 was really interested in the property in suit. He also held that there was no reliable evidence to prove the claim against them. In this view of the matter, he dismissed the suit against the mortgagee of 1886, but made a decree against the mortgagors on confession of judgment. The decree directed the sale of the properties included in the mortgage so far as the mortgagors were concerned. The mortgagees subsequently executed this decree and purchased the property at the execution sale. Upon these facts, the learned vakil for defendants 5 to 7, the mortgagees of 1884 and 1887, contends that the present plaintiffs, whose predecessor, the mortgagee of 1886, was a party defendant to the suits of 1894, are precluded by the doctrine of *res judicata* from setting up the mortgage of 1886. In support of this position reliance is placed upon the cases of *Srigopal v. Pirthi Singh* (1) and *Gopal Lal v. Benarasi Pershad Chowdhry* (2).

It is argued on the other hand by the learned vakil for the plaintiffs that as the suits of 1884 were dismissed as against

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(1) (1902) L. R. 29 I. A. 118; I. L. R. 24 All. 429. (2) (1904) I. L. R. 31 Calc. 428.

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the mortgagee of 1886, defendants 5 to 8 are now precluded from relying upon their mortgages of 1884 and 1887, which they had unsuccessfully attempted to enforce as against their predecessor in the two earlier litigations, to which we have referred. In support of this position, reliance is placed upon the decision of their Lordships of the Judicial Committee in the case of *Run Bahadur Singh v. Lucho Koer* (1). After a careful examination of the authorities upon which reliance is placed on both sides, we are clearly of opinion that the contention of the plaintiffs is well founded and must prevail. It is not necessary to examine minutely the decisions in *Srigopal v. Pirthi Singh* (2) and *Gopal Lal v. Benarasi Pershad Chowdhry* (3), upon which reliance is placed on behalf of the defendants 5 to 8. The true foundation of the doctrine laid down in those cases was fully explained by this Court in the case of *Surjiram Marwari v. Barhamdeo Persad* (4). That principle to our mind has no application to the facts of the present case. It has been strenuously argued by the learned vakil for the defendants 5 to 8 that the mortgagee of 1886 was bound to establish his title, when he was brought before the Court in the litigations of 1894, and that his omission or failure to do so precluded him from relying upon that title in the present litigation. In our opinion, there is no foundation for this argument. So far as the security of 1887 was concerned, the mortgagee of 1886 was, as we have already explained, not a necessary party to the suit to enforce it. No doubt he might be a necessary party, if the plaintiffs attempted to obtain priority in favour of their mortgage of 1887 over the mortgage of 1886. But, although a suggestion to that effect was made in the plaint, there was no relief expressly claimed on that basis. The question was not even raised in the issues, and the suit ultimately failed by reason of the failure of the mortgagees of 1887 to establish the genuineness of their security as against the mortgagee of 1886. In the same manner,

(1) (1884) I. L. R. 11 Calc. 301, 306.

(2) (1902) L. R. 29 I. A. 118; I. L. R.

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(3) (1904) I. L. R. 31 Calc. 428.

(4) (1905) I C. L. J. 337, 350.

so far as the security of 1884 was concerned, although the mortgagee of 1886 was a proper and necessary party, the suit to enforce the claim was unsuccessful by reason of the failure of the mortgagees of 1884 to establish the genuineness of the security as against the mortgagee of 1886. Under these circumstances, it is impossible to hold that merely because the mortgagee of 1886 failed to establish his security in the suits of 1894, such failure in any way precludes him or his representative from now relying on his title under the mortgage.

The decrees of dismissal, which were made in the suits of 1894, were decrees, which were based on the finding that the mortgages of 1884 and 1887 were not proved to be genuine and for consideration as against the mortgagee of 1886. That finding, therefore, clearly operates as *res judicata* in favour of the mortgagee of 1886. The decrees, which were made, were in accordance with and based on this finding, see *Peary Mohun Mukerjee v. Ambica Churn Bandopadhyaya* (1).

On the other hand, the finding that there was no evidence to show that the alleged mortgagee of 1886 was in any way interested in the mortgaged premises, could not be taken as the basis of the judgment of the Court. The decrees might be said to be decrees in spite of that finding, and when the suits were dismissed as against the mortgagee of 1886, it was not open to him to challenge, by way of appeal, the finding of the Subordinate Judge upon the question of the validity of his mortgage. In this view of the matter, that finding does not in any way operate as *res judicata*. See *Run Bahadur Singh v. Lucho Koer* (2), *Nundo Lall Bhattacharjee v. Bidhoo Mookhy Debee* (3), *Thakur Magundeo v. Thakur Mahadeo Singh* (4), *Peary Mohun Mukerjee v. Ambica Churn Bandopadhyaya* (1) and *Concha v. Concha* (5).

We are not unmindful that in a litigation between the present defendants 9 to 12 on the one hand as plaintiffs, and defendants 1 to 4 (as mortgagors),

(1) (1897) I. L. R. 24 Calc. 900.

(4) (1891) I. L. R. 18 Calc. 647.

(2) (1884) I. L. R. 11 Calc. 301, 306. (5) (1886) L. R. 11 App. Cas. 541, 552.

(3) (1886) I. L. R. 13 Calc. 17.

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defendants 5 to 8 (as puisne encumbrancers) and defendant 14 (as subsequent mortgagee), as defendants on the other hand, the present defendants 5 to 8 succeeded in obtaining a declaration that not only in respect of their bond of 1884, but also in respect of a sum of Rs. 1,172 out of the consideration for their bond of 1887, they were entitled to priority over the bond of 1885. That question, however, appears to have been then decided between the present defendants 5 to 8 and 9 to 12; it is clear that there was no controversy in that litigation between defendants 5 to 6 and 14, the predecessor of the plaintiffs, in respect of this matter. It cannot, therefore, be suggested that the decision in that litigation in any way operates as *res judicata* for, as is now well settled, when an adjudication between defendants is necessary to give the appropriate relief to the plaintiff, there must be such an adjudication, and in such a case the adjudication will be *res judicata* between the defendants as well as between the plaintiff and the defendants; but for this, there must be a conflict of interest amongst the defendants, and the judgment must define the real rights and obligations of the defendants *inter se*; see *Magniram v. Mehdi Hossein Khan* (1), *Chajju v. Umrao Singh* (2), *Balam Bhat v. Narayan Bhat* (3), *Muhammad Kuni Rowthan v. Visvanathaiyar* (4) and *Cottingham v. Earl of Shrewsbury* (5).

No materials have been placed before us to show that the decisions in the suit, to which we have referred, was given under circumstances, which could possibly make it operate as *res judicata* between co-defendants. We must, consequently, hold that the decisions in the suits of 1894, brought by defendants 5 to 8 to enforce their mortgages of 1884 and 1887, operate as *res judicata*, and as those suits were dismissed, rightly or wrongly, against the mortgagee of 1886, the defendants 5 to 8 are not entitled to rely upon those mortgages as against the plaintiffs, who now represent the mortgagee of 1886. The true test to be applied to a case of this descrip-

(1) (1903) I. L. R. 31 Calo. 95.

(3) (1900) I. L. R. 25 Bom. 74.

(2) (1900) I. L. R. 22 All. 386.

(4) (1902) I. L. R. 26 Mad. 337.

(5) (1843) 3 Hare 627.

tion is, are the defendants 5 to 8 entitled, after their defeat in the litigations of 1894, to enforce their mortgages of 1884 and 1887 against the mortgagee of 1886? If they are not, and if their remedy was by way of an appeal against the adverse decisions of 1894, they are obviously precluded from falling back upon their mortgages of 1884 and 1887. The effect of their purchase in execution of their own decrees has been to give them a title against their mortgagors alone, and as the suits, in which these decrees were made, were dismissed against the mortgagee of 1886, they have not obtained a valid title against him or his representative in interest. The Subordinate Judge was, in our opinion, clearly in error in this matter. He proceeded on the assumption that the effect of the dismissal of the suits of 1894 was to leave the parties in the position, which they would have occupied, if the mortgagee of 1886 had never been joined as a party defendant in those suits. This view is obviously unsound. The mortgagee of 1886 was brought before the Court; he challenged the validity of the mortgages of 1884 and 1887, as he was entitled to do, and his resistance was successful. Under these circumstances, the conclusion appears to be irresistible that the present plaintiffs may rightly claim the full benefit of the dismissal of the suits of 1894 and are entitled to enforce their security against the properties in the hands of defendants 5 to 8, precisely as if the mortgages of 1884 and 1887 had no real existence. The second ground advanced on behalf of defendants 5 to 8 must be overruled, and the first ground taken on behalf of the plaintiffs must consequently prevail.

The third ground taken on behalf of defendants 5 to 7 raises the question, whether they are not entitled to priority over the mortgage of 1886, which the plaintiffs seek to enforce, in respect of the sum of Rs. 1,952, which formed part of the consideration of their mortgage of 1887. It is established by the evidence that out of the sum advanced by defendants 5 to 7 upon the mortgage of 1887, Rs. 100 was paid in satisfaction of the interest due upon a prior mortgage of the 15th December 1884 executed in favour of persons now represented by

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defendants 5 to 8 ; another sum of Rs. 1,072 was applied in discharge of interest due on a bond of the 29th March 1885, and a third sum of Rs. 780 was applied in satisfaction of the interest due on a bond of the 2nd June 1885. Upon these facts, it is argued by the learned vakil for defendants 5 to 7 that to the extent of these three sums of money, which were applied in satisfaction of interest due on three bonds earlier than that of the present plaintiffs, they are entitled to a declaration of priority. In support of this position, reliance is placed upon the cases of *Gokaldas Gopaldas v. Puranmal Premsukhdas* (1), *Gopal Chunder Sreemany v. Herembo Chunder Holdar* (2) and *Lomba Gomaji v. Vishvanath Amrit Tilvankar* (3).

It is argued, on the other hand, by the learned vakil for the plaintiffs respondents that there are two objections to the right claimed by the defendants, each of which is fatal to their contention. It is pointed out, in the *first* place, that the decision of this question is barred by the principle of constructive *res judicata*, and it is contended, in the *second* place, that upon the admitted facts, the principle of subrogation has no possible application. In our opinion, the argument advanced on behalf of the appellants is not well founded, and their contention must be overruled. It is manifest that this claim for priority might and ought to have been set up in the litigation of 1894 in which the mortgage of 1887 was enforced. (Jones on Mortgages, sections 1439-41 and 1589A, 6th edition, Vol. II, pages 397 and 526.) Indeed, as we have already pointed out, the mortgagees did set out in their plaint circumstances sufficient to form the foundation of the claim now advanced. It was not, however, pressed, and the suit appears to have been dismissed so far as the mortgagee of 1886 was concerned. There is, therefore, considerable force in the contention that it is no longer open to the mortgagees of 1887 to set up in the present litigation the claim for priority, which might and ought to have been adjudicated upon in the litigation of 1894. See

(1) (1884) L. R. 11 L. A. 126 ;
 I. L. R. 10 Calc. 1035.

(2) (1889) I. L. R. 16 Calc. 523.

(3) (1893) I. L. R. 18 Bom. 86.

Srigopal v. Pirthi Singh (1), *Mahabir Pershad Singh v. Macnaghten* (2), *Kameswar Pershad v. Rajkumari Ruttan Koer* (3). It is not necessary, however, to rely upon this ground, as a question might arise as to whether the doctrine of constructive *res judicata* is applicable where the subject-matters of the two suits are different: *Surjiram Marwari v. Barhamdeo Persad* (4). We are satisfied, however, that the second branch of the contention of the learned vakil for the respondent must be sustained. That contention, in substance, is *two-fold*, namely, *first*, that the doctrine of subrogation entitles a person to the benefit of a mortgage in favour of a stranger, either when he is compelled to pay it off to protect an interest of his own in the property mortgaged or by an agreement; and *secondly*, that in any event, the entire amount of a senior encumbrancer must be paid before subrogation can be claimed.

The first of these points raises the question of the nature of subrogation and the principle on which it is founded. That principle is thus explained by Mr. Justice Sutherland in *Ellisworth v. Lockwood* (5) "Subrogation or substitution by operation of law to the rights and interests of the mortgagee in the land is by redemption, and redemption is payment of the mortgage debt after forfeiture by the terms of the mortgage contract, so that really the subrogation or substitution by operation of law arises or proceeds on the theory that the mortgage debt is paid. If the holder of a bond assigned it to a party claiming a right to redeem, the latter is subrogated by the assignment to the mortgage debt and mortgage security and to the instrument evidencing such debt and security, and there is no room or occasion for subrogation by operation of law." Consequently, it may be said, in general, that to entitle one to invoke the equitable right of subrogation, he must either occupy the position of a surety of the debt or must have made the payment under an agreement with the debtor

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(1) (1902) L. R. 29 I. A. 118; I. L. R. 24 All. 429. (3) (1892) L. R. 19 I. A. 234; I. L. R. 20 Calc. 79.

(2) (1889) L. R. 16 I. A. 107; I. L. R. 16 Calc. 682. (4) (1905) I C. L. J. 337, 353.

(5) (1870) 42 N. Y. 89.

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or creditor that he should receive and hold an assignment of the debt as security, or he must stand in such a relation to the mortgaged premises that his interest cannot otherwise be adequately protected. The foundation of the rule was elaborately examined in a recent case, *Wilkins v. Gibson* (1), in which Mr. Justice Cobb stated the rule to be that a "Subrogation will arise only in those cases, where the party claiming it advanced the money to pay a debt which, in the event of default by the debtor, he would be bound to pay, or where he had some interest to protect, or where he advanced the money under an agreement, express or implied, made either with the debtor or creditor that he would be subrogated to the rights and remedies of the creditor." This distinction between the position of a person, who pays off a mortgage to protect an interest of his own and the position of another, who claims subrogation by agreement, is well marked, and is said to have been borrowed from the Civil Law, which recognised two kinds of subrogation, namely, "legal subrogation" which took place of right and without any agreement as such by the creditor and as a matter of equity, and "conventional subrogation" which was applied, where an agreement was made with the person paying the debt that he would be subrogated to the rights and remedies of the original creditor. See *Howe's Studies in the Civil Law*, 1905, page 256; see also *Bank v. Tillman* (2), where the doctrine of conventional subrogation is examined. The case of *Gokaldas Gopaldas v. Puran Mal Premeukhdas* (3), where it was held that the purchaser of an equity of redemption, who had paid off the first charge, might use the first mortgage as a shield against mesne encumbrancers, the payment being made by a person who is under no personal obligation to pay, only to protect his own interest, furnishes an illustration of the former class of cases. The case of *Jagatdhar Narain Prasad v. A. M. Brown* (4), furnishes an illustration of the second class of cases; whereas

(1) (1901) 113 Georgia 31; 38 S. E.

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(3) (1884) L. R. 11 I. A. 126 I. L. R.

10 Calc. 1035.

(2) (1901) 106 Georgia 55, 31 S. E. 794. (4) (1906) I. L. R. 33 Calc. 1133.

the decision of their Lordships of the Judicial Committee in *Dinobundhu Shaw Chowdhry v. Jogmaya Dasi* (1) shows, the line dividing the class of cases, where no bargain is made when the money is advanced, and cases where the money is advanced on the understanding that the creditor should be subrogated to the position of the mortgagee. It is only in the first class of cases that the question of intention to keep the mortgage alive arises. The doctrine of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation, being under no legal obligation to make the payment, and not being compelled to do so for the preservation of any rights or properties of his own. This doctrine is nowhere more clearly and concisely expounded than in the judgment of the Supreme Court of the United States in *Etna Life Insurance Company v. Middleport* (2), where the principle laid down by Chancellor Johnson in *Gadsden v. Brown* (3) and by Chancellor Walworth in *Sandford v. McLean* (4) was adopted as well founded on reason. That principle is, that subrogation as a matter of right is never applied in aid of a mere volunteer. Legal substitution into the rights of a creditor for the benefit of a third person takes place only for his benefit, who, being himself a creditor, satisfies the lien of a prior creditor, or for the benefit of a purchaser, who extinguishes the encumbrances upon his estate, or of a co-obligor or surety, who discharges the debt, or of an heir, who pays the debts of the succession, *Shin v. Budd* (5). Any one, who is under no legal obligation or liability to pay the debt, is a stranger, and, if he pays the debt, he is a mere volunteer, *Arnold v. Green* (6). To the same effect are the decisions in *Crippen v. Chappel* (7), *Hough v. Etna Life Insurance Company* (8) and *Watson v. Wilcox* (9). The learned

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(1) (1901) L. R. 29 I. A. 9; I. L. R. (5) (1862) 14 N. J. Eq. 234.

29 Cal. 154.

(6) (1889) 116 N. Y. 566.

(2) (1887) 124 U. S. 525.

(7) (1886) 35 Kansas 495; 57 Am. Rep. 187.

(3) (1843) Speers, Eq. (S. C.) 37.

(8) (1870) 57 Ill. 318; 11 Am. Rep. 18.

(4) (1832) 3 Paige N. Y. 122.

(9) (1876) 39 Wis. 643; 20 Am. Rep. 63.

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vakil for the respondents placed reliance upon passages from Sheldon on Subrogation, sections 240-243, which fully bear out his contention, and the position is further strengthened by the expositions contained in Jones on Mortgages, section 874 (6th Edition, Vol. I, page 913), and Harris on Subrogation, sections 792-797. If these doctrines, which appear to us to be based on principles of justice, equity and good conscience, are applied to the case before us, it becomes manifest that the claim put forward on behalf of defendants 5 to 7 is entirely unfounded. When a portion of the money advanced by them was applied in part satisfaction of the interest due on earlier bonds, it could not be said that they were compelled to make the payment to protect an interest of their own in the property mortgaged to them; much less could it be suggested that there was any agreement, express or implied, upon which a claim for subrogation could be founded. There is a second answer, however, as the learned vakil for the respondents has pointed out, to this claim for subrogation. The sums were applied only in part satisfaction of the claim for interest due upon earlier bonds, and it is difficult to appreciate how, under such circumstances, a claim for subrogation could arise. The person, who makes the payment, cannot, by simply paying the interest as it accrues or paying or discharging a portion of the interest which has already accrued, claim a right of subrogation. He must pay the entire amount of an incumbrance, which is senior to his own. This doctrine is based upon a perfectly intelligible principle; for as we have already explained, subrogation is by redemption, and, unless there is redemption, it is not easy to perceive how subrogation can take place, *Merritt v. Hosmer* (1), *Street v. Beal* (2), *O'Reilly v. Holt* (3), *Carter v. Neil* (4). It is obvious that the contrary view would lead to endless difficulties. It would enable a person, who has made a part payment of the interest due on

(1) (1858) 11 Gray (Mass) 276; 71 Am. Dec. 713.

(2) (1864) 16 Iowa 68; 85 Am. Dec. 504.

(3) (1877) 4 Woods C. C. 645; 18 Fed Cases 792.

(4) (1858) 24 Georgia 346; 71 Am. Dec. 136.

a mortgage security, to claim subrogation; would he then occupy the position of a joint mortgagee with the person whose claim is partially satisfied? What would be his position with regard to interest subsequently accruing upon the prior mortgage, and how are the rights to be worked out if, as in the case before us, the prior mortgagees have already sued and enforced their security? The rule, therefore, that before one creditor can be subrogated to the rights of another, the demand of the latter must be entirely satisfied, so that he shall be relieved from all further trouble, risk and expense, is based upon good-sense and ought to be adopted as applicable to the case before us, Sheldon on Subrogation, sections 14, 19, 25, 70 and 83; Harris on Subrogation, section 29. To use the language in *Hollingworth v. Floyd* (1) "it would not subserve the ends of justice to consider the assignment of an entire debt to a surety as affected by operation of law, when he had paid but a part of it and still owed a balance to the creditor, and the Court would not countenance such an anomaly as a *pro tanto* assignment, the effect of which would only be to give distinct interests in the same debt to both creditor and surety." This view is in no way inconsistent with that taken by the learned Judges of the High Court in *Lomba Gomaji v. Vishvanath Amrit Tilwankar* (2). On the grounds, therefore, that the position of defendants 5 to 7 did not entitle them to claim the benefit of the principle of subrogation, and that partial payment was not sufficient to entitle them to succeed to the rights of the prior encumbrancer by subrogation, we must overrule the third ground upon which the decision of the Subordinate Judge is sought to be assailed.

The fourth ground, upon which the decision of the Subordinate Judge is challenged on behalf of defendants 5 to 7 is that the plaintiffs are not entitled to claim interest at the rate specified in the mortgage of 1886, inasmuch as on the 18th June 1889, they entered into a compromise with their mortgagors, by which they undertook to reduce their claim for

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(1) (1807) 2 Harris & Gill (Maryland) 91. (2) (1893) I. L. R. 18 Bom. '86.

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future interest to 6 per cent. per annum. In answer to this contention, it is argued on behalf of the plaintiffs respondents that the compromise in question is inoperative in law, as it was not registered under section 17 of the Registration Act. The facts, so far as a statement of them is necessary for the decision of this point, are not disputed before this Court. It appears that in 1899 the present defendant 14, the mortgagee under the bond of 1886, sued the mortgagors for recovery of interest due at the time of institution of that suit. On the 18th June 1889, a petition of compromise was filed on behalf of the parties. It recited that the plaintiffs had been paid Rs. 100 in cash, that the balance of Rs. 593 was to be paid within the 4th February 1890, and that upon failure to do so, interest would run upon the decretal amount at the rate of 60 per cent. per annum. The compromise further contained a term by which the mortgagee agreed to accept future interest on the entire amount of debt covered by the bond, at the rate of 6 per cent. per annum. This compromise was recited in the preamble to the decree, which was made in that litigation. The decree, however, was based on that portion only of the compromise, which related to the subject-matter of that suit, as is required by section 375 of the Code of Civil Procedure. No decree was made in respect of the covenant by the mortgagee to reduce the claim for future interest to 6 per cent. per annum. Upon these facts, it is contended on behalf of defendants 5 to 7 that the compromise is operative, though not registered, because it was recited in the decree. In support of this position reliance is placed upon the cases of *Bindesri Naik v. Ganga Saran Sahu* (1) and *Raghubans Mani Singh v. Mahabir Singh* (2). It is argued, on the other hand, by the plaintiffs respondents that the petition of compromise, in so far as it related to matters beyond the scope of the suit, in which it was filed, required to be registered, and this view is sought to be supported by a reference

(1) (1897) I. L. R. 20 All. 171 ; L. R. 25 I. A. 9. (2) (1905) I. L. R. 28 All. 78.

to the cases of *Pranal Anni v. Lakshmi Anni* (1), *Muthayya v. Venkataratnam* (2), *Birbhadra Rath v. Kalpataru Panda* (3) and *Patha Muthammal v. Esup Rowther* (4). In our opinion, the contention advanced on behalf of the plaintiffs respondents is well founded and must prevail. The point is really concluded by the decision of their Lordships of the Judicial Committee in *Pranal Anni v. Lakshmi Anni* (1), the true effect of which was explained in *Birbhadra Rath v. Kalpataru Panda* (3). After a careful examination of all the authorities on the subject, we adopt the view put forward in that case. A petition of compromise, in so far as it relates to properties in suit, does not require registration under section 17 of the Registration Act, and the decree, in so far as it gives effect to the settlement touching such properties, operates as *res judicata*. If it gives effect, however, to the settlement touching properties extraneous to the litigation, the decree is, to that extent, clearly without jurisdiction and is inoperative. In relation to these extraneous properties, the parties must fall back upon the petition itself, which cannot, without registration, effectively declare or create title to immoveable property exceeding Rs. 100 in value. The same view was adopted by this Court in the case of *Kali Charan Ghosal v. Ram Chandra Mandal* (5). The case of *Raghubans Mani Singh v. Mahabir Singh* (6), upon which much stress was laid on behalf of the appellants, appears to be based upon a misapprehension of the judgment of their Lordships of the Judicial Committee in *Pranal Anni v. Lakshmi Anni* (1). With all respect for the learned Judges, who decided that case, we find ourselves entirely unable to adopt their view, and we are supported in our conclusion by the decision of the Madras High Court in *Patha Muthammal v. Esup Rowther* (4), *Muthayya v. Venkataratnam* (2) and *Achuta Ram Raja v. Subbaraju* (7). If the view adopted

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(1) (1899) L. R. 26 I. A. 101; I. L. R. (4) (1906) I. L. R. 29 Mad. 365.

22 Mad. 508.

(5) (1903) I. L. R. 30 Calc. 783.

(2) (1901) I. L. R. 25 Mad. 533.

(6) (1905) I. L. R. 28 All. 78.

(3) (1905) 1 C. L. J. 388.

(7) (1901) I. L. R. 25 Mad. 7.

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by the learned Judges of the Allahabad High Court in *Raghubans Mani Singh v. Mahabir Singh* (1) is well founded, litigants may, as was pointed out in *Birbhadra Rath v. Kalpataru Panda* (2), evade with impunity the provisions of the Registration Act, the Stamp Act, the Court-fees Act and the Civil Courts Act, which last defines the jurisdictions of different classes of Courts. We are unable to persuade ourselves to hold that this is what was intended by their Lordships of the Judicial Committee. It has not been disputed, and it cannot be disputed, that the petition of compromise in question purported to extinguish title to or interest in immoveable property of a value exceeding Rs. 100. We must consequently hold that it is inoperative, because it was not registered. The fourth ground taken on behalf of defendants 5 to 7 cannot consequently be supported.

The first ground taken on behalf of the plaintiffs respondents, who have preferred a separate appeal, relates to the question of *res judicata*, and has already been disposed of in connection with the second ground taken on behalf of defendants 5 to 7.

The second ground taken on behalf of the plaintiffs raises the question, whether defendants 5 to 7 would not be bound to account for the profits received by them during their possession of the mortgaged properties after their purchase at the execution sale, and whether these defendants are entitled to have interest at the contract rate specified in their securities, calculated after the dates of their respective decrees. Both these contentions would seem to be well founded, and it is sufficient to refer to the case of *Ganga Das Bhattar v. Jogendra Nath Mitra* (3), which is entirely in accord with the decision of their Lordships of the Judicial Committee in *Kedar Lal Marwari v. Bishen Pershad* (4). It is not necessary, however, to deal with this point in detail because, as we have already held,

(1) (1905) I. L. R. 28 All. 78.

(3) (1907) 5 C. L. J. 315.

(2) (1905) 1 C. L. J. 388.

(4) (1903) L. R. 31 I. A. 57; I. L. R. 31
 Calc. 332.

defendants 5 to 7 are not entitled to rely upon their mortgages of 1884 and 1887 as against the mortgage of 1886, which the plaintiffs seek to enforce. The plaintiffs are entitled to enforce their security precisely in the same manner as if the mortgages of 1884 and 1887 had never been created.

The only point taken on behalf of defendants 9 to 12 raises the question, whether they are not entitled to their costs in the Court of first instance as well as in this Court. It is manifest that the case of the plaintiffs as against them has entirely failed and the learned vakil for the plaintiffs has not seriously resisted the claim for costs put forward on behalf of defendants 9 to 12.

The result, therefore, is that Appeal No. 540 of 1904 preferred by defendants 5 to 7 fails, and must be dismissed. Appeal No. 566 of 1904 preferred by the plaintiffs must be allowed, and the decree of the Subordinate Judge modified to this extent, namely, the words "subject to the prior mortgage charge of the defendants 5 to 8 and" and "the mortgage decree of the defendants Nos. 5 to 8 and" shall be expunged. The cross objection of defendants 9 to 12 must also be allowed, and they will be entitled to their costs in the Court below. So far as the costs of this Court are concerned, defendants 5 to 7 must pay the costs of the plaintiffs respondents in Appeal No. 540 of 1904, and the plaintiff appellants in Appeal No. 566 of 1904 must pay the costs of defendants 9 to 12. Only one decree will be drawn up in the two appeals, and, to avoid future difficulties, the decree must be self-contained without any reference to the decree of the Subordinate Judge.

HOLMWOOD J. 1 concur.

S. C. G.

Decree modified.

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APPELLATE CIVIL.

*Before Hon'ble Mr. R. F. Rampini, Acting Chief Justice, and
Mr. Justice Ryves.*

SATISH CHANDRA MUKHERJEE *

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PORTER.

Setting aside sale, application for—Agreement with a co-lessee of judgment-debtor and the decree-holder—Dissuading purchaser from bidding—Civil Procedure Code (Act XIV of 1882), ss. 244, 311.

An agreement with the co-lessee of the judgment-debtor and the decree-holder that he would purchase the property and then sell it to the co-lessee for the amount of his decree, in consequence of which the co-lessee refrained from bidding at the sale, is not by itself sufficient to vitiate a sale.

Mahomed Mira Ravuthar v. Savvasi Vijaya Raghunadha Gopalar (1) explained and followed. *Woopendro Nath Sircar v. Brojendro Nath Mundul* (2) distinguished.

APPEAL by the decree-holder, auction-purchaser.

The appellant in this case obtained a decree for over Rs. 5,700 against Colonel A. R. Porter, the petitioner in this case. In execution of the said decree, the decree-holder attached and brought to sale the house of the Home Farm at Ballygunge belonging to Colonel Porter and himself purchased the property for Rs. 5,685. Colonel Porter applied to the Additional District Judge of Alipore to have the sale set aside on various grounds, amongst which may be mentioned non-publication of the writ of attachment and sale proclamation, inadequacy of price as the direct result of fraud. The allegation of fraud, which Colonel Porter contended vitiated the sale, was that Mrs. Evennett, the partner in the business of the Home Farm, was dissuaded from bidding at the sale by the decree-holder.

* Appeal from Original Order, No. 222 of 1906, against the order passed by C. T. Beachcroft, District Judge of 24-Parganas, dated 4th April 1906.

(1) (1899) I. L. R. 23 Mad. 227; L. R. 27 I. A. 17.

(2) (1881) I. L. R. 7 Calc. 346.

The learned District Judge held on the evidence that there was ample proof of the publication of the writ of attachment and the sale proclamation and the price fetched at the sale was adequate. He, however, held on the authority of *Mahomed Mira Ravuthar v. Savvasi Vijaya Raghunadha Gopalar* (1) that the agreement between Mrs. Evennett and the decree-holder amounted to a conflict between the duty and the interest of the decree-holder and the judgment-debtor and was sufficient to vitiate the sale.

Babu Hara Prasad Chatterji (*Babu Shoshee Shikhar Basu* with him) for the appellant. The District Judge has misunderstood the case of *Mahomed Mira Ravuthar v. Savvasi Vijaya Raghunadha Gopalar* (1). The Calcutta case referred to in that case, *Woopendro Nath Sircar v. Brojendro Nath Mundul* (2), is inapplicable. Mrs. Evennett is not the purchaser.

No one appeared for the respondent.

Cur. adv. vult.

RAMPINI A.C.J. AND RYVES J. This appeal arises out of an order of the Additional District Judge of Alipore setting aside a sale in execution of a decree under the provisions of sections 244 and 311 of the Civil Procedure Code. The judgment-debtor in his application stated that there had been no attachment of the property sold, that the decree-holder fraudulently and dishonestly caused the suppression of the service of the sale-proclamation on the property sold and that no sale-proclamation was ever served on the property and that the decree-holder, who was the auction-purchaser, with fraudulent intention, under-estimated the value of the property and purposely abstained, with a view to cause wrongful loss to the petitioner and wrongful gain to himself, from mentioning the share of the petitioner in the property sold. These are the only allegations of fraud. The petitioner, however, went

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1) (1899) I. L. R. 23 Mad. 227; L. R. 27 I. A. 17.

(2) (1881) I. L. R. 7 Calc. 346.

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on to say that "On account of non-publication of the sale, there were no *bona fide* bidders at all and although your petitioner's co-sharer Mrs. Evennett was present on the first day of the sale, and she and the decree-holder bid against each other on the second day she desisted from bidding any further, and the petitioner believes that she was dissuaded by the decree holder from bidding any further." In consequence of all these circumstances it was alleged that the property had been sold at a grossly inadequate price.

The lower Court has found on the evidence and we agree with that finding that there is no reason to suppose that the attachment of the property and service of the sale proclamation were not duly made. The property in question is a leasehold of some 17 bighas situated at some distance from Ballygunge in a lonely and jungly locality and belonged to the judgment-debtor and Mrs. Evennett, who carried on a farming business upon it. The judgment-debtor had erected buildings upon the property and had expended a considerable amount of money in so doing. The decree-holder's decree at the time of the application for sale amounted to Rs. 5,697-7-9 pies. The money was due for materials supplied to the judgment-debtor for the erection of some of these farm buildings. There were other decrees also outstanding on similar accounts. The lease had two years to run at a monthly rental of Rs. 50 with the stipulation that, if the rent was not paid for two months, the lease should terminate; and there was a clause in it under which the lessees had the option to buy the property for Rs. 15,000, and if they failed to exercise this option, the buildings that had been erected would become the property of the lessor. It appears that Rs. 15,000 was not a cheap price for this piece of land, which, from its locality and nature, is unsuitable for anything but farming purposes, which had not in the past proved very successful. It is not easy therefore to estimate the market value of the judgment-debtor's share in the lease. On the first day of the sale it appears that Mrs. Evennett made a bid of Rs. 5,630. This was the highest bid on that occasion. It was, however, not accepted

and the property was put up again the next day, when it was knocked down to the decree-holder for Rs. 5,685.

Mrs. Evennett, in her evidence, stated that she came intending to bid on the second day and was ready to bid up to Rs. 6,000, that she did not do so because the decree-holder's pleader asked her not to bid, and an agreement was come to between them that the decree-holder should sell her the property for the amount of his decree, and that, relying on this assurance of the decree-holder's pleader, she did not bid. She admitted in her cross-examination that she thought that the decree-holder wanted to bid up to his claim. He told her that he would settle it for less with her; he said he would be reasonable and so she asked him to let her pleader know the lowest amount he would take and to write to her on the subject. That was before the sale on the second day. She thought the decree was for Rs. 5,830; it was not over Rs. 6,000. She further stated that she offered the decree-dolder Rs. 3,000 after the sale. The decree-holder himself also gave evidence. He denies that he had any talk with Mrs. Evennett before the sale. He says "After the sale was over, Mrs. Evennett asked me whether I could return to her the property sold. I said I could return it, if the decretal amount was paid to me. I said I could return it, if I got Rs. 5,700 decreed by this Court and nearly Rs. 140—the costs of the High Court." This is all the material evidence as to what happened.

On these materials, the lower Court has found that Mrs. Evennett was willing to bid up to Rs. 6,000. It says :— "Taking her evidence with that of the decree-holder I think there must have been some understanding between them that they would not bid against each other, but that she would get the property back for the amount of the decree." Accepting this finding which is the most favourable to the judgment-debtor that can be arrived at, in our opinion it would not be sufficient to justify, as the lower Court rightly held, the setting aside of the sale. The lower Court, however, has gone on to hold that Mrs. Evennett was in a fiduciary relation to the judgment-debtor and was taking advantage of her

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partner's absence to buy his share as cheaply as she could and to effect this, came to an understanding with the decree-holder. Then quoting a passage from the judgment of the Privy Council in *Mahomed Mira Ravuthar v. Savvasi Vijaya Raghunadha Gopalar* (1), he held that this arrangement was in itself sufficient to vitiate the sale and consequently he ordered it to be set aside.

It appears to us that the learned Additional Judge has misapplied the ruling of the Privy Council. The ruling on which he relies is *Mahomed Mira Ravuthar v. Savvasi Vijaya Raghunadha Gopalar* (1). The facts of that case are set out in *Jayinilabdin Ravuttan v. Vija Raghunadha Ayyarappa Maiken Gopaliar* (2) and are very similar to the facts found in this case. In that case, the judgment-debtor was a minor under the Court of Wards. His property worth Rs. 1,50,000 was put up for sale under two mortgage decrees. The principal judgment-debtor obtained leave to bid at the sale and had previously entered into a written agreement with one Papanad Zemindar to purchase the property himself and sell it to Papanad Zemindar for Rs. 85,000, and it was agreed between them that the Zemindar should dissuade other persons from bidding at the auction. It was found that the Zemindar had dissuaded persons from bidding and the decree-holder himself bought the property for Rs. 78,000. The application to set aside that sale further alleged that the sale took place before the expiration of 30 days from the date on which the sale-notice had been published, that as a matter of fact the proclamation of sale had not been published in the villages and that the petitioner's interest in the villages had not been properly described.

The Court of first instance held that this contract vitiated the sale. On appeal, the High Court of Madras held that this in itself was not enough to set aside the sale. It, however, set aside the sale on another ground, namely, that the decree-

(1) (1899) I. L. R. 23 Mad. 227; L. R. 27 I. A. 17.

(2) (1896) I. L. R. 19 Mad. 315.

holder, when he applied for leave to bid, had suppressed from the knowledge of the Court the fact that he had entered into such an agreement with Papanad Zemindar, and that this suppression of fact amounted to fraud upon the Court, entitling the judgment-debtor to say that, in point of law, no leave to bid was granted. Their Lordships said that "the case was one in which there was a duty incumbent upon the appellant to disclose all the circumstances within his knowledge bearing on the question of the expediency of his being allowed to bid. Without such disclosure, it is impossible for the Court to exercise its discretion."

On appeal to the Privy Council, this judgment was set aside and the sale was affirmed.

The learned Additional Judge relies on a passage in the Privy Council judgment to be found on pages 232 and 233, namely, "the decree-holder was acting in concert with, and partially for the benefit of, one who stood in a fiduciary relation to the infant-debtor; and there was clearly a conflict between their duty and their interest." Those remarks refer to a dictum of the Judges of the High Court of Calcutta in *Woopendra Nath Sircar v. Brojendro Nath Mundul* (1). The facts of that case are very different. There the decree-holder sought to sell the property belonging to a minor, who was under the guardianship under the Court of Wards of one Radha Mohan, who was the uncle of the decree-holder and lived jointly with him. In that case it was proved that the agent of Radha Mohan, the manager of the infant judgment-debtor, dissuaded persons from bidding at the sale with the result that the decree-holder himself bought the property at a cheap price to the benefit of both Radha Mohan and himself. In setting aside that sale, the learned Judges of the High Court said—"We think that when liberty is given to a decree-holder to bid at the sale of the judgment-debtor's property, he is bound to exercise the most scrupulous fairness in purchasing that property; and, if he or his agent dissuades others from purchasing

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at the sale, that of itself is a sufficient ground why the purchase should be set aside." With reference to these remarks, their Lordships of the Privy Council said that the dictum was too sweeping in its terms. At the same time they pointed out that the decision of the Calcutta High Court in itself was correct, because the decree-holder there was acting in concert with and partially for the benefit of one, who stood in a fiduciary relation to the infant debtor, and there was clearly a conflict between their duty and their interest.

Now, in this case, Mrs. Evennett obtained no benefit whatever from the sale. At the utmost, she refrained from making a bid because probably she hoped that she would obtain the property more cheaply from the decree-holder, but there was no duty on her to bid at all and, on her own showing, the agreement was that she could get the property on payment of the amount of the decree-holder's decree, which she herself stated was between Rs. 5,830 and Rs. 6,000.

We, therefore, think that there was no fraud on the part of the decree-holder, which would justify us in setting aside the sale. There are no other grounds for setting aside the sale. We, therefore, set aside the order of the Court below and decree the appeal with costs.

Appeal decreed.

S. M.

ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

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December 7.

Injunction—Jurisdiction of High Court—Injunction to restrain proceedings in a Moffusil Court—Jurisdiction of Courts of Equity—Foreign Courts.

The jurisdiction of the High Court to restrain proceedings in Courts outside its jurisdiction is governed by the same principles as those that govern Courts of Equity in England, namely, that the party, whom it is sought to restrain, must be within the limits of the jurisdiction of the High Court, so that in the event of an injunction being granted against him and being disobeyed, he would be subject to process for contempt.

The Carron Iron Co. v. Maclaren (1) followed. *Mungle Chand v. Gopal Ram* (2) not followed. A Court of Equity can only restrain a person from proceeding with a suit in a Foreign Court, if the person sought to be restrained is within the jurisdiction of the Court.

CIVIL RULE.

THIS was a rule obtained by the plaintiffs calling upon the defendant to shew cause why he should not be restrained from proceeding with his suit instituted in the Court of the Subordinate Judge of Farruckabad pending the plaintiffs' suit instituted in the High Court.

Mr. Pugh, for the plaintiffs. The Court has power to grant an injunction restraining the defendant from prosecuting his suit at Farruckabad pending this suit here. *Mungle Chand v. Gopal Ram* (2). Under sections 648 and 649 of the Code he can be arrested. The mere fact that you have to send your order to another Court does not of itself make it an order of this Court. We are suing on several hundies and the defendant has brought a suit in the Moffusil Court to have these same hundies cancelled. Our cause of action is substantially the same as the defendant's in the Moffusil Court.

* Original Civil Suit No. 506 of 1908.

(1) (1855) 5 H. L. C. 416,

(2) (1906) I. L. R. 34 Calc. 101.

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None of the Courts in British India are 'Foreign Courts,' as they do not come within the definition of 'Foreign Court' in the Code of Civil Procedure.

Mr. B. C. Mitter and Mr. S. K. Mullick for the defendant. When this Court restrains by injunction it does not do so under the Civil Procedure Code. *Rash Behary Dey v. Bhowani Churn Bhowe* (1). The jurisdiction which the Court inherited is what the Supreme Court had at the time it was abolished. The High Court has jurisdiction over the whole of Bengal and Orissa. *Bhagwandas Mitharam v. Rivett-Carnac* (2). Clauses 9 and 13 of the Charter, Kerr on Injunction, page 527.

The Carron Iron Company v. Maclaren (3) and '*Morocco Bound*' *Syndicate, Limited v. Harris* (4) cited. The Scotch and Irish Courts are Foreign Courts in this Country. Section 20 of the Code governs this case, and section 648 does not apply.

FLETCHER J. This is a motion by the plaintiffs to restrain the defendant from proceeding with a suit, which he has instituted in the Court of the Subordinate Judge of Farruckabad.

The facts may be shortly stated as follows :—

The plaintiffs instituted this suit on the 4th of July last against the defendant to recover the sum of Rs. 6,260 alleged to be due to the plaintiffs from the defendant on three promissory notes all dated the 10th of September 1906.

It is admitted that the defendant resides and carries on business at Farruckabad in the United Provinces outside the jurisdiction of this Court. This suit was instituted by the plaintiffs by leave granted under clause 12 of the Charter on the ground that part of the plaintiffs' cause of action arose within the limits of the Original Civil Jurisdiction of this Court. The defendant on the 20th August last filed a suit in the Court of the Subordinate Judge at Farruckabad praying for a declaration that the said three promissory notes are null

(1) (1906) I. L. R. 34 Calc. 97.

(2) (1898) 3 C. W. N. 186.

(3) (1855) 5 H. L. C. 416, 436.

(4) [1895] 1 Ch. 534.

and void. To this suit one Eaton the original payee of the promissory notes is made a co-defendant with the present plaintiffs. Eaton has been adjudicated an insolvent and is, it is said, now a prisoner in the Rangoon Jail.

From the evidence that has been filed on this motion I have no doubt but that the suit in Court at Farruckabad, which has been instituted by the present defendant, has been so instituted for the purpose of harassing the present plaintiffs. The questions arising in that suit could have been raised and decided in the present suit.

The question, however, for my decision is, whether I can restrain the defendant from proceeding with his suit at Farruckabad having regard to the fact that the defendant does not reside within the jurisdiction of this Court.

That Courts of Equity have jurisdiction to restrain persons within their jurisdiction from prosecuting suits in Foreign Courts can not be doubted. The principles on which Courts of Equity act are clearly laid down by Lord Cranworth in his judgment in the well-known case of *The Carron Iron Co. v. Maclaren* (1).

"There is no doubt as to the power of the Court of Chancery to restrain persons within its jurisdiction from instituting or prosecuting suits in Foreign Courts wherever the circumstances of the case make such an interposition necessary or expedient. The Court acts *in personam* and will not suffer any one within its reach to do what is contrary to its notions of Equity merely because the act to be done may be in point of locality beyond its jurisdiction." And again at page 442 the noble and learned Lord proceeds :—

"But here the appellants not only had property in England, but agents for the sale of goods. How does that vary the case? The existence of such an agency may in some cases enable third parties to sue the principals though out of the jurisdiction by reason of their being for certain purposes represented by their agents. But I can discover no principle, which would justify the Courts of this country in holding that

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the existence of an agency here for the sale of goods can deprive a foreign principal of his rights as a creditor in his own country."

And later in the same case Lord Brougham in the course of his speech to the House points out that jurisdiction is limited to cases where the party sought to be restrained is within the limits of jurisdiction of the Court, for the only remedy for breach of the injunction is by way of process for contempt, which being proceedings of a quasi-criminal nature could not be enforced against a party resident out of the jurisdiction.

The principle therefore appears to be clear that a Court of Equity can only restrain a person from proceeding with a suit in a Foreign Court, if the person sought to be restrained is within the jurisdiction of the Court. It has been argued by the learned Counsel on behalf of the plaintiffs that none of the Courts in British India are Foreign Courts as they do not fall within the definition of "Foreign Court" in the Code of Civil Procedure.

That no doubt is true for the purposes of the Civil Procedure Code, but the definition "Foreign Court" in that Code is for the purposes of that Code only. I think there is little difference on this point between the Courts in British India and the Courts in England, Scotland and Ireland. For some purposes the Courts in Scotland and Ireland are not "Foreign" to the Courts in England, but for the purpose of restraining suits they have always been considered foreign. The plaintiff's counsel has however placed much reliance on the case of *Mungle Chand v. Gopal Ram* (1) where Sale J. granted an injunction restraining the defendant in that suit, who resided at Bareilly, from proceeding with a suit in the Court at Bareilly.

The learned judge in the course of his judgment says :—
"This Court has acted for a long series of years on the view that the powers of control over persons *within its jurisdiction* by injunctions operating *in personam* are not restricted by

the provisions of the Civil Procedure Code." With this statement of the law I am in thorough accord. But I take leave to differ from the learned judge in the latter portion of his judgment when he says that "the Bareilly Court will doubtless stay the defendant's suit in the Bareilly Court, when that Court is informed that this Court has restrained the defendant from proceeding with that suit." This statement of the learned judge is a wide extension of the view that he states this Court has acted on for a long series of years, viz., to exercise powers of control over persons within its jurisdiction and appears to me to be in direct conflict with the decision of the House of Lords in *The Carron Iron Co. v. Maclaren* (1). Then it has been argued that Farruckabad is within the jurisdiction of this Court as being a place in British India. To this argument I am unable to assent. The limits of the jurisdiction of the High Court at Calcutta are those which were formerly possessed by the Supreme Court at Calcutta and continued to the High Court by the Indian High Courts Act, 1861, viz., to have jurisdiction over all persons in Bengal, Behar and Orissa.

Can it be suggested that this Court has jurisdiction over persons resident within the Original Jurisdiction of the High Court of Bombay? The Court at Farruckabad for the purpose of the suit now pending before it and which the plaintiffs desire to restrain the defendant proceeding with, is just as much a Court of co-ordinate jurisdiction with this Court as the High Court at Bombay is in the case of a suit properly pending before it.

It follows in my opinion that the jurisdiction of this Court to restrain proceedings in Courts outside its jurisdiction is governed by the same principles as those that govern Courts of Equity in England, namely, the party, whom it is sought to restrain, is within the limits of the jurisdiction of this Court so that in the event of an injunction being granted against him and being disobeyed he would be subject to process of contempt. The proper course of proceeding in this case would have been for the plaintiffs to apply to the Court at

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Farruckabad to stay all proceedings in the suit before it, pending the determination of the present suit.

This motion therefore fails. The plaintiffs must pay the costs of the motion.

Attorney for the plaintiffs : *Wilson & Co.*

Attorney for the defendant : *P. C. Law.*

R. G. M.

ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

BANKU BEHARI SIKDAR

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL.*

Negotiable Instrument—Forged indorsement—Holder in due course—Onus of proof—Negotiable Instruments Act (XXVI of 1881), ss. 9, 46, 58, 59.

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No person can claim a title to a negotiable instrument through a forged indorsement. Such an indorsement is a nullity and must be taken as if no such indorsement was on the instrument.

Chandra Kali Dabee v. E. P. Chapman (1) not followed. *Hunsraj Purmanand v. Ruttonji Walji* (2) followed.

Where a plaintiff establishes the fact that a negotiable instrument was obtained from its lawful owner by means of fraud, the onus of proving that a third party was a holder in due course lies on the defendant.

ORIGINAL SUIT.

THIS was a suit brought by the plaintiffs Banku Behari Sikdar and Parmessur Sikdar, executors of the will of one Gouri Prosad Kundu deceased, to recover from the defendant, the Secretary of State for India, the value of certain Government securities of the face value of Rs. 48,000 under the following circumstances.

Gouri Prosad Kundu, a wealthy inhabitant of Gopalbari in the District of Faridpur, died in Calcutta on the 22nd August 1904, possessed of Government securities of considerable value, and he appointed the plaintiffs his executors. On the 21st November 1904, the plaintiffs applied to the Court of the District Delegate of Faridpur for grant of probate of the testator's will, but owing to protracted litigation between the plaintiffs and the widow of the deceased testator, probate was not obtained till the 21st July 1906. Shortly after the death of the testator, his widow Sreemutty Hemanta Kumari

* Original Civil Suit No. 714 of 1907.

(1) (1905) I. L. R. 32 Calc. 799, 815. (2) (1899) I. L. R. 24 Bom. 65, 67.

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Dassi obtained possession of Government securities for Rs. 48,000 which stood in the name of the testator by means of a forged endorsement from the District Court of Faridpur. The plaintiffs and the administrator *pendente lite* made every effort to trace the missing securities, and from the 25th November 1904 from time to time wrote to the Public Debt Office at Calcutta, informing them of the loss of the securities and the circumstances, of such loss and requesting them to stop the securities, but the Public Debt Office refused to give any information regarding them when the securities were from time to time presented to them for renewal under forged indorsements.

The plaintiffs in their plaint submitted that the Public Debt Office wrongfully threw great obstacles in the way of the plaintiffs and the administrator *pendente lite* and prevented them from getting any information regarding these securities, but on or about the 26th March 1906 the plaintiffs came to learn from a letter written by the Public Debt Office to the Officiating District Judge of Faridpur, that the securities for Rs. 48,000 had been cancelled by renewal. Immediately the administrator *pendente lite* applied for information to the Public Debt Office for the numbers of the renewal notes and for the names and residences of the person or persons in whose favour the notes had been transferred successively, and for the dates of such transfer, but the Public Debt Office declined to give any information whatever, unless the administrator *pendente lite* executed a bond for Rs. 3,852 with approved sureties not to sue them in respect of any of the notes. This the plaintiffs declined, and further submitted that the testator was a holder in due course of the securities in question at the time of his death, and that, as they were his executors, they were entitled to hold the securities, and contended that the Public Debt Office had acquired no title to the securities and had wrongfully destroyed them, which action deprived the plaintiffs of their value.

The plaintiffs also submitted that in the alternative the Public Debt Office had failed to pay the sum secured by the notes, although called upon by the plaintiffs to do so, and they

claimed to be entitled to recover the value of these securities. The defendant the Secretary of State denied that the securities were presented for renewal under forged endorsements, and denied that the Public Debt Office wrongfully put obstacles in the way of the plaintiffs or the administrator *pendente lite* getting information about the securities, and submitted that the securities for Rs. 48,000 were between the 23rd May and the 6th June 1905 on several occasions presented at the Public Debt Office by the Bank of Bengal for renewal by the issue of new notes, and the Public Debt Office in lieu of the said securities and in accordance with the practice of its office, properly, regularly and in due course, issued new notes to the Bank, and the former notes were afterwards cancelled. He denied that the former notes were destroyed and said that they were even now in the Public Debt Office, and submitted that the plaintiffs had no cause of action against him by reason of the renewal and cancellation of the securities in suit, and he submitted that the suit should be dismissed with costs.

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Mr. Chakravarti and *Mr. Stokes* for the defendant the Secretary of State. Section 9 of the Negotiable Instruments Act covers the case of defective endorsement. *Hunsraj Purmanand v. Ruttonji Walji* (1), *Chandra Kali Dabee v. E. P. Chapman* (2) referred to. The Indian Contract Act places the offence of forgery on the same footing as any other offence. There is no such thing under the Indian Negotiable Instruments Act as section 24 of the Bills of Exchange Act, which deals with a case of forgery. See section 118, clause (g) of the Negotiable Instruments Act and *Bank of Bengal v. Mendes* (3). The word 'offence,' in section 58 of the Negotiable Instruments Act includes the offence of forgery. The rule laid down in *The London Joint Stock Bank v. Charles James Simmons* (4) applies to this case. *Lloyd's Bank Limited v. Cooke* (5) and *Smith v. Prosser* (6) cited.

(1) (1899) I. L. R. 24 Bom. 65, 67.

(4) [1892] A. C. 201.

(2) (1905) I. L. R. 32 Calc. 799, 815.

(5) [1907] 1 K. B. 794.

(3) (1880) I. L. R. 5 Calc. 654, 665.

(6) [1907] 2 K. B. 735, 754.

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The plaintiffs have failed to show that some of the signatures endorsed are not genuine. The onus is upon the plaintiffs to show that the endorsed signatures are genuine. If they do not show that the endorsement is not genuine, then the presumption is that it is a genuine endorsement. The quantum of proof is under section 9 of the Negotiable Instruments Act. The plaintiffs cannot presume forgery, they must show that the endorsement is a forgery [Fletcher J. Directly the plaintiff shows the notes were stolen, the onus shifts to you.] I have to show I was a holder in due course no doubt, and section 9 of the Negotiable Instruments Act protects me, if I deal with the matter in due course and pay full value.

Mr. B. C. Mitter (*Mr. Dunne* and *Mr. Mullick* with him) for the plaintiffs. The case of the *Bank of Bengal v. Mendes*. (1) is an express case in point. [Fletcher J. The words in section 9 'without having sufficient cause to believe that any defect existed' means, as in English law, without notice.] That is so, but section 58 shows that, once I prove the endorsement is fraudulent, the onus shifts to the defendant to show that he is a *bonâ fide* holder without notice. *Kennedy v. Thomas* (2), *Ganesdas Ramnarayan v. Lachminarayan* (3) and *Rai Bahadur Sahu Lalta Persud v. Charles Campbell* (4). This case is governed by section 118, clause 9 of the Negotiable Instruments Act. See also section 10. I am entitled to succeed in tort and in contract for the full amount at the rate of the conversion, and I claim to be entitled to compensation.

FLETCHER J. The plaintiffs, who are the executors of one Gouri Prosad Kundu deceased, seek by this suit to recover against the defendant, the Secretary of State for India in Council, the value of certain Government Promissory Notes of the face value of Rs. 48,000 under the circumstances hereafter stated.

The deceased Gouri Prosad Kundu, whose native village was Gopalbari in the District of Faridpur, had for some years

(1) (1880) I. L. R. 5 Calc. 654.

(3) (1894) I. L. R. 18 Bom. 570.

(2) [1894] 2 Q. B. 759.

(4) (1905) 9 C. W. N. 841.

prior to his decease carried on a rice business in the Suburbs of Calcutta.

The evidence is, and it is not disputed, that he was possessed of Government Promissory Notes of the face value of Rs. 56,000. These Government Notes were from time to time pledged with the firm of Roy of 55 Sova Bazar Street, Calcutta, for the purpose of raising money, when required, for the rice-business.

For the last eight years of his life-time the deceased Gouri Prosad Kundu had owing to declining health ceased to take any active part in the rice-business and had retired to his native village of Gopalbari.

There, on the 10th of May 1904, Gouri Prosad Kundu executed a registered will.

The evidence is, and there can be little doubt that it is true, that the deceased had his Government Promissory Notes with him at Gopalbari at the date he executed his registered will. In such will the deceased specifically refers to the Government Promissory Notes for Rs. 56,000, and it is in evidence that the Government Promissory Notes were taken out of the box, in which they were kept, for the purpose of taking the particulars thereof for insertion in the registered will.

Sometime between 8th and 11th May 1904, the deceased left Gopalbari and came to Calcutta for the purpose of undergoing medical treatment. He was accompanied to Calcutta by a niece, named Kankana, who has been called as a witness for the plaintiffs. The deceased, according to the evidence which I accept, brought with him to Calcutta the Government Promissory Notes for Rs. 56,000 and the registered will. A house in Calcutta had been hired for the deceased and there he remained until his death on the 22nd of August 1904. The deceased's health, when he came to Calcutta, was bad and he gradually grew worse and for sometime before his death his condition was such that he could not transact any business. It is common ground between the parties that on the 15th of June 1904, the deceased through his servants drew at the Public Debt Office the interest due on the Government Promissory

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Notes. This being so, it follows that any blank endorsements, which were on the notes for Rs. 56,000 at the date of the deceased's death, must have been placed thereon after the 15th June 1904, because the Public Debt Office will not pay interest on Government Promissory Notes, when they are endorsed in blank. The amount realised for interest on the Notes for Rs. 56,000 was at or about the time the interest was drawn invested by the deceased in the purchase of Government Promissory Notes of the face value of Rs. 5,000.

It is admitted by the plaintiffs that after the date on which the interest was drawn the deceased pledged Government Promissory Notes of the face value of Rs. 2,000 with the said firm of Roy to secure the advance of two sums of Rs. 900 each required for the purpose of the deceased's rice-business. These Notes were redeemed by the deceased on the 16th July 1904. It appears from the evidence that, whenever the deceased used to require money for the purpose of his business, he used to borrow it from the said firm of Roy on the pledge of his Government Promissory Notes. This is shown by the evidence of the cashier of the firm, who produces the books showing many transactions between his firm and the deceased. The only transaction between this firm and the deceased after the 15th June 1904 was the borrowing by the deceased of the two sums of Rs. 900 mentioned above. One of the witnesses for the defendant, who was formerly employed in the deceased's rice-business, stated in his evidence that the deceased used to borrow money on pledge of the Government Promissory Notes from firms other than the said firm Roy. This witness was, however, unable to state the names of any such other firm or the nature or amount of such transaction, and it would appear also that he was not on good terms with the plaintiffs.

The deceased, as I have already stated, died on the 22nd August 1904.

Accordingly I hold on the evidence that at the date of the deceased's death all the Government Promissory Notes Rs. 56,000 and Rs. 5,000 were in his possession.

The deceased left him surviving his widow and his said niece Kankana, who was trustee in his affairs and was accustomed to keep the The plaintiffs, who married two nieces of the executors named in his registered will. Shortly after the deceased's death the widow, Kankana and the plaintiffs went to Gopalbari. They took with them the registered Government Promissory Notes. At that time the widow and the plaintiffs appeared to have been on good terms. On their arrival at Gopalbari the servant of a creditor of the deceased's business named Khettermoni arrived and offered as security for the debt that was owing to him the Government Promissory Notes. According to the plaintiffs' evidence, which I accept, the Government Promissory Notes were of the face value of Rs. 7,000 and were made over as security for Khettermoni's debt by the deceased. It is a not insignificant fact that the remaining notes had been endorsed by the deceased in blank, that the parties should go out of their way to make the notes as security to Khettermoni, which were not being negotiated.

The relations between the widow and the plaintiffs ceased to be friendly. The widow seems to have been dissatisfied of the terms of the registered will.

A few days after the Pujahs in October 1904 a meeting of the agnates of the deceased's family and the widow came to, it was decided that the Government Promissory Notes should be kept under two locks, one of one should remain in the possession of Kankana and the other should be kept by the widow. On November 1904, the plaintiffs applied to the District Judge of Faridpur for grant of probate of the registered will. This application was opposed by the widow.

The correspondence between the legal advisers of the plaintiffs and the Bank of Bengal, who manage the Public Office on behalf of the Government of India, the

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Notes. This being so, it follows that any blank endorsements, which were on the notes for Rs. 56,000 at the date of the deceased's death, must have been placed thereon after the 15th June 1904, because the Public Debt Office will not pay interest on Government Promissory Notes, when they are endorsed in blank. The amount realised for interest on the Notes for Rs. 56,000 was at or about the time the interest was drawn invested by the deceased in the purchase of Government Promissory Notes of the face value of Rs. 5,000.

It is admitted by the plaintiffs that after the date on which the interest was drawn the deceased pledged Government Promissory Notes of the face value of Rs. 2,000 with the said firm of Roy to secure the advance of two sums of Rs. 900 each required for the purpose of the deceased's rice-business. These Notes were redeemed by the deceased on the 16th July 1904. It appears from the evidence that, whenever the deceased used to require money for the purpose of his business, he used to borrow it from the said firm of Roy on the pledge of his Government Promissory Notes. This is shown by the evidence of the cashier of the firm, who produces the books showing many transactions between his firm and the deceased. The only transaction between this firm and the deceased after the 15th June 1904 was the borrowing by the deceased of the two sums of Rs. 900 mentioned above. One of the witnesses for the defendant, who was formerly employed in the deceased's rice-business, stated in his evidence that the deceased used to borrow money on pledge of the Government Promissory Notes from firms other than the said firm Roy. This witness was, however, unable to state the names of any such other firm or the nature or amount of such transaction, and it would appear also that he was not on good terms with the plaintiffs.

The deceased, as I have already stated, died on the 22nd August 1904.

Accordingly I hold on the evidence that at the date of the deceased's death all the Government Promissory Notes for Rs. 56,000 and Rs. 5,000 were in his possession.

The deceased left him surviving his widow Hemanta Kumari and his said niece Kankana, who was trusted by the deceased in his affairs and was accustomed to keep the deceased's keys. The plaintiffs, who married two nieces of the deceased, are the executors named in his registered will. Shortly after the deceased's death the widow, Kankana and the plaintiffs returned to Gopalbari. They took with them the registered will and the Government Promissory Notes. At that time the widow and the plaintiffs appeared to have been on good terms. After their arrival at Gopalbari the servant of a creditor of the deceased's business named Khettermoni arrived and pressed for security for the debt that was owing to his mistress. According to the plaintiffs' evidence, which I accept, the box containing the Government Promissory Notes was produced and notes of the face value of Rs. 7,000 were made over as security for Khettermoni's debt. Now some of the notes that were made over as security for Khettermoni's debt bear no endorsement by the deceased. It is a not insignificant fact that, if all the remaining notes had been endorsed by the deceased in blank, that the parties should go out of their way to hand over notes as security to Khettermoni, which were not capable of being negotiated.

The relations between the widow and the plaintiffs then ceased to be friendly. The widow seems to have disapproved of the terms of the registered will.

A few days after the Pujahs in October 1904 there was a meeting of the agnates of the deceased's family and as part of the arrangement come to, it was decided that the Government Promissory Notes should be kept under two locks, the key of one should remain in the possession of Kankana and that of the other should be kept by the widow. On the 21st November 1904, the plaintiffs applied to the Court of the District Delegate of Faridpur for grant of probate of the registered will. This application was opposed by the widow.

The correspondence between the legal advisers of the plaintiffs and the Bank of Bengal, who manage the Public Debt Office on behalf of the Government of India, then commences.

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It will, however, be convenient before proceeding further to set out the rules framed by the Bank of Bengal with reference to the stoppage of Government Promissory Notes—such rules are as follows :—“The stoppage of notes is effected by a written application addressed to the Public Debt Office containing a correct description of the loans, numbers and amounts of the notes to be stopped. The address of the applicant should also be given in full. On presentation at the Public Debt Office of any of the notes so stopped, notice of presentation is promptly given requiring the production of an order of a competent Court within ten days from the date of notice for the further detention of the notes by the Public Debt Office, failing which the stoppage is removed against the notes presented, which are then dealt with as though no stoppage had been entered against them.

“In the case of notes stopped by residents in the mofusil or at any great distance from Calcutta, the period allowed for the requisite order of Court is extended to 15 or 20 days according to the circumstances. Steps should be taken to identify the presenter of a stopped note and his address should be registered in case of need.”

These rules approximate to the practice of the Bank of England and other public Companies in England with reference to distringas notices, and it cannot be doubted, if the Public Debt Office had acted in accordance with these rules, this case would never have arisen.

On the 25th November, a few days after the application for probate in the Court at Faridpur, the plaintiff's attorneys in Calcutta wrote to the Bank of Bengal a letter in the following terms :—

“Estate Gouri Prosad Kundu deceased.”

“The above named deceased died on the 22nd August last possessed of the following Government Promissory Notes and leaving a will, whereby he appointed our clients Babus Banku Behari Sikdar and Parmessur Sikdar executors. Our clients have applied for probate of the will and expect to obtain the same shortly. The deceased has not endorsed or transferred

the notes during his life-time. We are instructed to request you not to pay the interest on the notes to any one except our clients, who are the only persons rightfully entitled to receive the same."

The schedule to the letter sets out full particulars of the notes.

This letter appears to me to come clearly within the rules relating to stoppage of the notes. The Bank are informed first, of the death of the deceased and that the plaintiffs are the executors and then there is a request for the stoppage of payment of interest.

The Bank reply to that letter on the 26th November 1904 that they could not recognise the plaintiffs, until they produced probate of the will.

Again on the 7th December 1904, the plaintiffs' attorneys wrote a further letter to the Bank, in which they stated "the probate will be produced to you after it is obtained from Court. No one besides our clients have the right to deal with the Government Promissory Notes in question." On the same date, the 7th December 1904, the District Judge at Faridpur appointed Asutosh Maitra, who has been called as a witness in this case, to be administrator *pendente lite* of the estate of the deceased.

On the 9th December 1904, Asutosh Maitra went to Gopalbari to take possession of the estate of the deceased. On arriving there he was informed that the notes were in the custody of the widow and Kankana and was requested not to take possession of them as the parties hoped to come to a settlement.

The administrator *pendente lite* returned to Faridpur and reported the matter to the District Judge.

On the 14th or 15th December, the administrator *pendente lite* proceeded to Gopalbari for the second time.

The administrator *pendente lite* was there informed that the Government Promissory Notes had been removed by the widow. On the morning after his arrival he had an interview with the widow, who stated that an elderly female relative, one Chandamoni, had got possession of the notes. The administrator *pendente lite* sought out Chandamoni, who denied having possession of the notes. The plaintiffs' evidence as to the

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widow getting possession of the notes is as follows :—The day before the second visit of the administrator *pendente lite* the widow and Kankana had a quarrel over the custody of the notes, and in the course of this quarrel Kankana threw down her key of the box, in which the notes were kept, and, subsequently, the widow removed the notes to the quarters of Upendra Nath Kundu, who was one of the co-sharers in the house at Gopalbari. Having regard to the subsequent history of the notes I think this story is correct.

Early in January 1905, the widow propounded in this Court a document, which she stated to be the last will of the deceased.

The widow was examined on commission in those proceedings and in the course of her evidence she stated that the Government Promissory Notes were in her possession. On the 29th April 1905, an application was made in the High Court for the appointment of a Receiver. The widow filed an affidavit in opposition to that application, wherein she stated that she had pledged certain of the notes for necessities and costs of the suit. On the 4th May 1905, the Official Receiver was appointed to be Receiver of the estate of the deceased.

The petition for probate in the High Court was subsequently dismissed, the Court holding the alleged will propounded by the widow to be a forgery.

It will now be convenient to trace the subsequent history (so far as it appears from the evidence) of the notes from the date they were removed by the widow in the middle of December 1904.

On the 13th March 1905, Upendra Nath Kundu (being the person to whose quarters the widow had removed the notes) pledged with the Bank of Bengal certain of the notes of the face value of Rs. 25,000 as security for an advance of Rs. 24,000.

On the 18th April 1905, Upendra Nath Kundu pledged a further parcel of the notes having a face value of Rs. 10,000 with the Bank of Bengal as security for an advance of Rs. 9,500.

On the 1st May 1905, Kedarnath, whom the evidence shows was connected with the widow, sold to the Bank of Bengal a further parcel of the notes having a face value of Rs. 11,000.

On the 29th May 1905, Upendra sold to the Bank of Bengal a further parcel of the notes of the face value of Rs. 2,000.

On the 21st June 1905, Upendra wrote to the Bank of Bengal requesting them to sell the pledged notes of the face value of Rs. 35,000. The Bank accordingly did so and paid the balance to Upendra.

Thus the Bank of Bengal acquired notes of the face value of Rs. 48,000 out of the notes for Rs. 61,000, which belonged to the deceased at his death. All these notes purport to be endorsed by the deceased. The Bank of Bengal presented the notes for Rs. 48,000 to the Public Debt Office and received in exchange in their own favour renewed notes for a similar amount.

The plaintiffs allege that these endorsements purporting to be made by the deceased are forgeries. The defendant denies this, and further says that, even if the endorsements purporting to be made by the deceased on the back of the notes are forgeries, yet the Bank of Bengal became "holders in due course" of the notes within the meaning of the Negotiable Instruments Act. Now Government Promissory Notes are payable to the order of the payee and therefore pass by endorsement and delivery only. (Section 46 of the Negotiable Instruments Act.)

A "holder in due course" is defined in section 9 of the Act as any person who for consideration becomes the possessor of a promissory note, bill of exchange or cheque if payable to bearer or the payee or endorsee thereof, if payable to or to the order of a payee, before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person, from whom he derived title.

But then the defendant says that under section 58 of the Negotiable Instruments Act, the Bank of Bengal, even if the signature of the deceased are forgeries, were "holders in due course," as they took the notes from some persons other than the deceased in good faith and for value.

In support of this proposition the defendant relies on the dictum of Stephen J. in *Chandra Kali Dabee v. E. P. Chapman* (1)

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With the greatest respect to the learned Judge I am unable to agree with his opinion that a person can claim title to a negotiable instrument through a forged endorsement. A forged endorsement is a nullity, and it must be taken as if no such endorsement was on the instrument. The judgment of Russell J. in the case of *Hunsraj Purmanand v. Ruttonji Walji* (1) commends itself to me. There does not appear to me to be any difference between the law in England and in India in this respect.

The defendant has also this further difficulty in his way with regard to a large number of the notes, namely, at the time the Bank of Bengal acquired the notes several of them had matured, and with respect to these the Bank could not be 'holders in due course' and could therefore only acquire the rights of their transferor (section 59 of the Negotiable Instruments Act). The real question is therefore whether or not the endorsements or the notes purporting to be those of the deceased are or are not genuine. Now on whom is the onus as to this issue.

In my opinion the onus is on the defendant with respect to the bills that had not matured. When once the plaintiffs have established, as I have held they have, that the widow obtained possession of these notes from the lawful owners by means of an offence or fraud, the onus of proving that the Bank became holders in due course lies on the defendant.

With respect to the notes that had matured the onus seems to me to be obviously on the defendant.

If that be so it is obvious that the evidence in this case falls far short of discharging that onus. But even if the onus were on the plaintiffs, I should hold that the plaintiffs have discharged that onus. There is first the fact that the notes were free from any endorsement on the day on which interest was drawn in June 1904. Secondly, I think the evidence establishes that after that date the notes, except the notes for Rs. 2,000, were not pledged with any one. The evidence on behalf of the plaintiffs further proves that the notes, except on the occasions when the notes for Rs. 2,000 were taken out of the box to raise the two

sums of Rs. 900 each, and when the box was taken out to restore these two notes on their redemption on the 16th July 1904, remained in the box until the deceased's death. There is also the important fact that some of the notes given to Khettermoni bore no endorsement, whereas one would have expected that, if some of the notes were blank endorsed notes without an endorsement by the deceased and therefore incapable of being negotiated, they would not have been given to Khettermoni.

In these circumstances I hold that the endorsements on the notes through which the Bank of Bengal claimed the notes are forgeries.

I must therefore enter judgment for the plaintiffs for a sum which at the present market price represents the value of Government Promissory Notes for Rs. 48,000.

With respect to the interest, which ought to have been received by the plaintiffs, unless the parties can agree upon the amount, I must direct a reference to ascertain this amount.

The defendant must pay to the plaintiffs their costs of this suit.

Attorney for the plaintiffs: *B. N. Bose & Co.*

Attorney for the defendants: *Eggar.*

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FLETCHER J.

APPELLATE CIVIL.

Before Mr. Justice Caspersz and Mr. Justice Coxe.

1908
November 9.

RAM LOCHAN SINGH

v.

BENI PRASAD KUMRI.

Civil Procedure Code (Act XIV of 1882) s. 492—Execution of decree—Application to a Civil Court for stay of sale in execution of a decree of a Revenue Court.

The Revenue Courts are Courts of Civil Judicature within the meaning of the Civil Procedure Code, in that their decrees, when transferred in the regular course, are to be treated in all respects as if they were passed by a Court of Civil Judicature.

Held, therefore, that an application under section 492 of the Code of Civil Procedure for stay of sale in execution of a decree of a Revenue Court in a suit under section 93 of Act XII of 1881, can be entertained by a Civil Court.

Onkar Singh v. Bhup Singh (1) dissented from.

APPEAL by the plaintiffs, Ram Lochan Singh and others.

Maharani Beni Pershad Koeri obtained a decree in the Court of the Collector of Balia, within the jurisdiction of the Allahabad High Court, under section 93 of Act XII of 1881, against the aforesaid plaintiffs on the 30th April 1897.

The decree having been partially executed in the district of Balia, was transferred to the district of Chapra, and then to the district of Bhagalpur, for execution. The property of the judgment-debtors (plaintiffs) having been advertised for sale, they put in an application under section 492 of the Code of Civil Procedure praying for an injunction to stay the sale of the properties attached in execution of the decree obtained by the defendants under the Rent Recovery Act of the United Provinces (Act XII of 1881), on the ground that the said decree was obtained fraudulently.

* Appeal from Order No. 38 of 1907, against the order of Nanda Lal Dey, Subordinate Judge of Bhagalpur, dated Jan. 5th, 1907.

(1) (1894) I. L. R. 16 All. 496.

The decree-holder denied that the decree was obtained by fraud and stated that the application for injunction was a frivolous one. The Court below having held that section 492 of the Code of Civil Procedure did not apply to the present case, inasmuch as the decree was of a Revenue Court, rejected the plaintiffs' application.

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Against this decision the judgment-debtors (plaintiffs) appealed to the High Court.

Babu Jogesh Chunder Dey for the appellants.

Babu Ram Churn Mitter and *Babu Jogendra Chunder Ghose* for the respondent.

CASPERSZ AND COXE JJ. This appeal comes before us in the course of a long litigation, the termination of which is not yet in sight. On the 30th April 1897, the defendant obtained an *ex parte* decree in suit No. 29 of 1896 under section 93 of the North-Western Provinces Rent Act (XII of 1881). That decree, it is conceded, was executed, and one of the execution cases was No. 296 of 1905 in the district of Saran where, it appears, the decree of the Balia Revenue Court had been sent for execution under the provisions of the Civil Procedure Code. Satisfaction not having been obtained, execution was next taken in the district of Bhagalpur, also, in terms of the Code of Civil Procedure, and the decree-holder attached 188 bighas of land situated in that district.

Thereupon, the plaintiffs, who represent the original judgment-debtors, instituted a title suit No. 686 of 1906, in the Court of the Subordinate Judge of Bhagalpur, and applied for a temporary injunction to stay the sale in the execution case then pending and arising out of the original *ex parte* decree of 1897. The Subordinate Judge granted an *ad interim* injunction. On the 5th January 1907, he disposed of the application under section 492 of the Civil Procedure Code, and held that the decree contemplated by clause (a), section 492 of the Civil Procedure Code means a Civil Court decree, and that, as

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the decree in the present case was a decree of a Revenue Court, section 492 did not apply. He followed the decision of the Allahabad High Court in *Onkar Singh v. Bhup Singh* (1). In the result, he allowed the objection, refused to issue any injunction, and set aside the *ad interim* injunction.

On appeal before us the questions are, *first*, whether the Subordinate Judge's view of the law is correct; and *secondly*, assuming it to be correct, whether, in the circumstances, he should not have allowed a temporary injunction to issue to stay the proceedings pending the disposal of title suit No. 686 of 1906.

Upon the first branch of the case, we entertain no doubt that the Subordinate Judge's view of the law is not correct. The decision in *Onkar Singh v. Bhup Singh* (1), on which the learned Subordinate Judge placed reliance, is not one which accords with the principle laid down by the Judicial Committee in *Nilmoni Singh Deo v. Tara Nath Mukerjee* (2). The decision of their Lordships was analysed and fully considered by a Full Bench of the Allahabad High Court in *Madho Prokash Singh v. Murlī Manohar* (3). This decision of the Full Bench of the same Court does not appear to have been brought to the attention of the Judges in *Onkar Singh v. Bhup Singh* (1). We are of opinion that the Revenue Courts are Courts of Civil Judicature within the meaning of the Civil Procedure Code, in that their decrees, when transferred in the regular course, are to be treated in all respects as if they were passed by a Court of Civil Judicature. To hold the contrary view would lead to various anomalies, one of which was mentioned and explained at page 303 of the report in the case of *Nilmoni Singh Deo v. Tara Nath Mukerjee* (2). Though the decree of the Revenue Court at Balia was a decree in the execution of which relief was sought to be obtained from a Court of Civil Judicature, to which it has been transferred, that decree did not lose its original character. It is only in the course of execution that the Civil

(1) (1894) I. L. R. 16 All. 496.

(2) (1882) I. L. R. 9 Calc. 295; L. R. 9 I. A. 174.

(3) (1883) I. L. R. 5 All. 406.

Court should treat such a decree in all respects as if it had been passed by itself.

The result, therefore, must be that the case is one in which it was competent to the Subordinate Judge, if he thought fit, to issue an *ad interim* injunction staying the execution proceedings.

It has been impressed upon us that we should not interfere in this case in order that the Subordinate Judge might consider whether he ought to grant a temporary injunction ; but we think that we should pass the necessary orders to save both time and further expense to the litigant parties. We have to consider whether a temporary injunction should now issue. Suit No. 686 of 1906 is one in which various questions of law are involved. Without expressing any opinion on those questions, or the issues which appear to have been framed, we think it sufficient to say that the alleged value of the property involved is Rs. 19,000 ; that the proceedings commenced more than ten years ago ; and that the chances of success are not altogether in favour of the plaintiff in that suit, which is virtually one to set aside the decree of the Revenue Court in another province. The amount for which execution has been levied comes to about Rs. 1,300. We think the proper order to pass in this case will be that, on the deposit of that amount, namely, Rs. 1,300 (one thousand and three hundred), in the Court of the Subordinate Judge within one month from this date, the Subordinate Judge do issue an injunction staying the proceedings in the execution case No. 1210 of 1906 pending in the First Munsif's Court, Bhagalpur. The amount will, of course, remain in deposit pending the result of suit No. 686 of 1906.

Appeal allowed.

APPELLATE CIVIL.

1903
November 10.

Before Mr. Justice Mitra and Mr. Justice Chitty.

TAMIJUDDI

v.

ASGAR HOWLADAR.

Superior landlord—Sub-tenant—Bengal Tenancy Act (VIII of 1885), s. 85.

As long as the interest of the tenant from year to year is not put an end to, the superior landlord has no right to eject the sub-lessee, who is not his raiyat, and the sub-lessee can maintain a suit for possession of the land, from which he is dispossessed by the superior landlord and a tenant of his, who is not the lessor of the plaintiff.

Section 85 of the Bengal Tenancy Act interpreted.

Gopal Mondal v. Eshan Chunder Banerjee (1) and *Madan Chandra Kapali v. Jaki Karikar* (2) explained and followed.

Srikant Mondul v. Saroda Kant Mondul (3), *Fazel Sheikh v. Keramuddi* (4), *Ramgati Mandul v. Shyama Charan Dutt* (5) and *Basaratulla Mundul v. Kasirunnessa Bibi* (6) held inapplicable.

SECOND APPEAL by the plaintiff.

Asgar Howladar, the *pro forma* defendant No. 2 in the suit and one of the respondents in this appeal was one of the *maliks* of the *howla* named after him. Within the said *howla* there is a *jote* in the name of Arman Howladar. The plaintiff, who is the appellant in this appeal, claims the land in suit under Arman. The *jote* is made up of two plots and he is in possession of only one plot, being dispossessed of the other in Magh 1304 B. S. by the defendant No. 1, who acted in collusion with Asgar Howladar, the superior landlord. Hence the suit for establishment of title and recovery of possession thereon.

* Appeal from Appellate Decree, No. 2106 of 1907, against the decree of F. J. Graham, Officiating District Judge of Faridpur, dated 13th June 1907, reversing the decree of Srish Chandra Roy, officiating Munsiff at Bhanga, dated 2nd Marh 1c907.

(1) (1901) I. L. R. 29 Calc. 148.

(4) (1902) 6 C. W. N. 916.

(2) (1902) 6 C. W. N. 377.

(5) (1902) 6 C. W. N. 919.

(3) (1898) I. L. R. 26 Calc. 46.

(6) (1906) 11 C. W. N. 190.

The defendants filed a joint written statement and pleaded *inter alia* that the lease granted by Arman to the plaintiff was void under section 85 of the Bengal Tenancy Act, since it was for an indefinite period, and that, even if the view were adopted that the lease was valid for nine years, that period having come to an end about a month after the dispossession, the plaintiff could have no title whatever at the date of the institution of the suit.

The Munsiff decreed the suit holding that the plaintiff had an existing under-raiyati right in the land in suit. The District Judge reversed the decision of the Munsiff, upholding the contention of the defendants.

Dr. Priyanath Sen for the appellant. So long as the tenancy of Arman Howladar subsists, the question whether the plaintiff's sub-lease is or is not binding against the superior landlord cannot arise. The tenancy of Arman Howladar serves as a shield to protect the sub-lease from being attached by the superior landlord, and the plaintiff is entitled to succeed on the basis of the sub-lease to recover possession from the defendants. Section 85 of the Bengal Tenancy Act does not help the defendants. Firstly, there is no sub-lease executed by the *raiyat*, but there is a *kabuliyat* executed by the under-raiyat. Hence sub-section (2) does not stand in the way of its registration. Secondly, assuming that a *kabuliyat* stands on the same footing as a lease, the lease in this case is not for a term exceeding nine years, but is really a lease from year to year. Thirdly, sub-section (2) only prohibits registration, and the effect of that would be to make the registration ineffectual, if it took place in contravention of that sub-section, and the further result would be that the case would come under sub-section (1). The raiyat himself cannot avoid the sub-lease, and, so long as the raiyat's interest subsists, the under-raiyat is safe. See *Gopal Mondal v. Eshan Chunder Banerjee* (1) and *Madan Chandra Kapali v. Jaki Karikar* (2). In *Srikant Mondul v. Saroda Kant Mondal* (3) the precise point raised by me

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does not seem to have been argued. If necessary, I would submit the case was wrongly decided.

Maulvi Wahed Hossein for the respondent. The sub-lease was void: *Fazel v. Keramuddi* (1), *Basaratulla Mundul v. Kasirunnessa Bibi* (2). Plaintiff, having no title, cannot succeed.

MITRA AND CHITTY JJ. There is no dispute as to the facts of this case. The defendant No. 2 is the superior landlord. The defendant No. 1 holds a plot of land under him. This plot is a portion of a holding held at one time by a raiyat Arman Howladar under the defendant No. 2. In 1889 Arman Howladar granted a lease of it along with other plots of land to the plaintiff. The lease was one from year to year; it was not permanent or for a term of years. The defendant No. 2 dispossessed the plaintiff, but the plaintiff is still in possession of other plots, which he holds under Arman. The present suit was instituted by the plaintiff for recovery of possession of this plot, on the ground that he was at least a tenant from year to year under Arman and that the defendants had no right to dispossess him.

On these facts the Munsiff held that the plaintiff was entitled to succeed and gave him a decree for possession. The lower Appellate Court had come to the conclusion that under section 85 of the Bengal Tenancy Act, the lease granted by Arman to the plaintiff was void. The lower Court has also held that the plaintiff had no title to rely on in a suit for recovery of possession.

It has, however, been found that the interest of Arman, as that of a raiyat, has not been put an end to. The plaintiff was paying to Arman the rent, which he was bound to pay under the lease of 1889, and Arman himself was paying rent to the second defendant. We do not see how we can come to the conclusion that the plaintiff had no title to sue for possession of the plot in dispute. He was, under the terms of the

lease to him, a tenant from year to year, and, even if the lease was void for certain purposes, it could not be held to be void against his own landlord Arman; and, as long as Arman's interest is not put an end to, the defendant No. 2 has no right to eject the plaintiff, who is not his raiyat.

The words of section 85 of the Bengal Tenancy Act appear to us to be clear, at least, in one respect, namely, that a sub-lease granted by a raiyat is void only under the circumstances specified therein as against the landlord, but is not necessarily void so far as the raiyat and the under-raiyat themselves are concerned. It does not appear to bar the creation of a right in the under-raiyat to the extent of the right of the raiyat himself. Sub-section (1) expressly says that a sub-lease shall not be valid against the landlord. Sub-section (3) also refers to the right of a landlord if a sub-lease was granted before the passing of the Bengal Tenancy Act. Sub-section (2) was put in between sub-section (1) and sub-section (3) evidently for the benefit of the landlord only to prevent the registration of a document, if it creates a tenancy of more than nine years or in perpetuity.

The lease in the present case is not one for more than nine years and is not also permanent, and there was therefore no bar to the registration of the lease, even if it be considered that the kabulyat had the same effect as a lease. Thus there is nothing in section 85 to make the lease to the plaintiff void for all purposes.

The lower Appellate Court has relied on certain cases decided by this Court, but none of them appear to us to be applicable to the facts of the present case. *Gopal Mondal v. Eshan Chunder Banerjee* (1) may be used in favour of the contention of the plaintiff and supports our view of the law as laid down in section 85. It lays down that a sub-lease granted by a raiyat in contravention of the provisions of section 85 of the Bengal Tenancy Act is void against the landlord only and not against the raiyat or any person claiming through the raiyat. To the same effect is the decision of this Court in *Madan Chandra*

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Kapali v. Jaki Karikar (1). The learned judges say in the last cited case that, when an under-raiyat holds under a written lease for an indefinite time (and in the present case, the lease is also for an indefinite time), the raiyat is not entitled to eject him by giving him a notice under section 49 (6), and that the words "the sub-lease shall not be valid" in section 85 (3) mean that the sub-lease shall not be valid against the landlord.

The decision in *Srikant Mondul v. Saroda Kant Mondul* (2) might at first sight appear to be against the view taken by us, but the question which has been raised before us was not distinctly raised before the learned Judges, who decided it, and it was not necessary for them to decide this question. The same observations would apply to *Fazel Sheikh v. Keramuddi* (3), *Ramgati Mandul v. Shyama Charan Dutt* (4) and *Basaratulla Mondul v. Kasirunnessa Bibi* (5).

We are, therefore, of opinion that the decision of the lower Appellate Court is erroneous. We accordingly set it aside and restore the judgment and decree of the Court of first instance with costs in all the Courts.

(1) (1902) 6 C. W. N. 377.

(3) (1902) 6 C. W. N. 916.

(2) (1898) I. L. R. 26 Calc. 46.

(4) (1902) 6 C. W. N. 919.

(5) (1906) 11 C. W. N. 190.

ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

ADVOCATE-GENERAL OF BENGAL

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BELCHAMBERS.*

1908
December 8.

Will—Bequest to a charity—General charitable intention—Death of executors—Charity not established—Accumulations of interest on fund—Residue of estate—Cy-pres doctrine.

Where a testator has manifested a general charitable intention, the bequest will not fail merely because the executors are dead, and the land which the testator desired for his charity is not available for the purpose. The fact that a charity has not been established earlier does not render the interest accrued on the fund applicable as a portion of the residue of the estate.

Accumulations of interest form part of the capital for the purpose of carrying out the object of the charity.

ORIGINAL SUIT.

THIS was a suit brought by the Advocate-General of Bengal for construction of the Will of one Kanai Lall deceased under the following circumstances. The testator died on the 25th November 1884 possessed of considerable property and leaving him surviving Gopal Lall Seal his only son. The Will, which was dated the 10th August 1883, contained, amongst other things, a direction to his executors to set apart a sum of Rs. 16,000 for a Charitable Dispensary and Rs. 50,000 for its up-keep, and the testator directed his executors to demarcate a portion of his garden house at Ramkristopore for the erection of the Dispensary. On the 11th December 1884, the executors obtained probate of the Will. Subsequently, on the 24th November 1886, the executors transferred all the property of the testator to the Administrator General of Bengal. Thereafter, on the 13th December 1886, Gopal Lall Seal brought a suit against the surviving executors and the Administrator General for construction of the Will of his father.

* Original Civil Suit No. 16 of 1908.

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On the 11th March 1887, a decree was made in favour of Gopal Lall Seal whereby it was held he took the property subject to valid legacies, annuities, and charitable trusts, and it was also referred to Mr. Robert Belchambers, at that time Registrar of the High Court, to enquire into and report upon certain matters including the charitable bequest. On the 26th April 1887, Mr. Robert Belchambers filed his report, by which Rs. 66,000 was to be deposited in Court to the credit of a separate account to be opened in the suit and entitled 'Charitable Dispensary,' and part of the joint property at Ramkristopore belonging to the deceased and his four brothers, should be set apart for the creation of a building for the Dispensary. This report was confirmed by the High Court on the 5th May 1887. The joint property at Ramkristopore was however partitioned in 1884, and in consequence it became impossible to carry out the wishes of the testator.

The funds now accumulated in Court to the credit of the 'Charitable Dispensary' account amounted to Rs. 20,411-1-6 in cash and Rs. 1,02,100 in Government paper. The plaintiff submitted, that the charitable bequest should be carried out in a manner as nearly in conformity with the wishes of the testator as the altered circumstances would permit, from the fund now standing to the separate account opened in suit No. 481 of 1886 and called a 'Charitable Dispensary,' and further that a proper scheme for the management of the charity should be settled by the Court.

Mr. W. H. Knight and *Mr. N. N. Sircar* for the defendants. Shamul Dhone Dutt, Norendra Lall Dey, Noyan Munjori Dasse and Panna Lall Seal. The first question is on clause 3 of the Will as to whether there is a particular intention. My submission being, that it must be a particular intention, for a particular poor, and at a particular spot. There is no idea of a general intention. Even if the testator had manifested a general charitable intention, the bequest must fail, because the discretion the testator gave to his executors was a personal one to erect a dispensary on a particular piece of land, but by reason of the death of all the executors and

certain partition proceedings, the testator's estate ceased to have any interest in the land in question. Consequently the intention of the testator must fail. Further the clause in the Will is too wide for a charitable gift. None of the requisities of a valid charitable gift exist there. It is a condition precedent, and the condition having become impossible the gift is void. On the question of the surplus of Rs. 60,000, the testator did not contemplate multiplying his charity by two. He never contemplated that the fund should go as from his death to the charity. The testator contemplated an interval of uncertain duration, and it was not until that interval had elapsed that the charitable gift would arise. Is the position altered by the fact that instead of a year elapsing or six months, a period of 20 years had elapsed? I submit it makes no difference at all. The Court has not only to look to the intention, but to the express intention. *Forbes v. Forbes* (1) distinguished.

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Mr. B. C. Mitter and *Mr. Eggar* for the Advocate-General. My contention is that this is not a gift to a particular charity. [Fletcher J. I do not want to hear you any further.]

M. H. D. Bose for the defendant, Robert Belchambers.

FLETCHER J. This is a suit brought by the Advocate-General for the purpose of having a scheme framed with reference to certain charitable bequests contained in the Will of Kanai Lal Seal, who died on the 25th November 1884. He appears to have been a man of considerable wealth.

By his Will, which is dated the 10th August 1883, after appointing his sister's husband, his wife, brother-in-law and his brother, his manager, James Meak and his dewan executors and executrix, the testator makes provision for the charitable bequests in question.

The terms of clause 3 of his Will are as follows :—

“I give in charity twelve to sixteen thousand rupees for building a lower roomed house and premises for the establish-

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ment of a Charitable Dispensary, and fifty thousand rupees for carrying on the said Dispensary. The executors shall demarcate one portion of the joint garden house we have at Ramkristoporegram as my separate share, and erect the buildings thereon, and after purchasing Company's papers for fifty thousand rupees, shall, out of the interest thereof, continue to carry on the work of the Charitable Dispensary. On to the said Dispensary (they) shall put up a signboard (slab) of stone with my name written on it, and (they) shall likewise have the power of paying over the said amount, and making over the charge of carrying on the work of the said Charitable Dispensary into the hands of Government."

After the death of Kanai Lall Seal an administration suit was started by Gopal Lall Seal, his only son, for the purpose of administering the estate, and in course of that administration suit, a reference was made to the Registrar to enquire and report upon certain matters including the public charitable bequest contained in the third paragraph of his Will.

On the 26th April 1887, the Registrar reports :—"A sum of Rs. 66,000 should be deposited in Court to the credit of a separate account to be opened in this suit and entitled Charitable Dispensary."

In accordance with the terms of that report, which was confirmed by an order of this Court on the 5th May 1887, a sum of Rs. 66,000 was lodged in Court to the credit of a separate account, which was opened in Suit 481 of 1886 and entitled "Charitable Dispensary Account" and these funds by the accumulation of interest are now represented by G. P. Notes of the nominal value of Rs. 1,02,100 and Rs. 20,411-1-6, in cash. Mr. Knight on behalf of the defendants, other than the defendant Belchambers, has argued, that clause 3 of the Will does not show any general charitable intention, and that the only object the testator had in view was, that his trustee should have a license to erect a building on a part of the garden house and there carry on the business of a dispensary. To that argument I am unable to assent. The testator begins clause 3 of his Will by giving in charity.

Mr. Knight next argued that the bequest, even if the testator had manifested a general charitable intention, must fail, because the discretion the testator gave to his executors was a personal one to erect a dispensary on a particular piece of ground, and that by reason of the death of all the executors and also by reason of certain partition proceedings, the testator's estate has ceased to have any interest in the land in question, and the testator's intention must wholly fail.

But according to the doctrine of Cy-pres, it is quite clear that the testator has manifested a general charitable intention, this should not fail to be carried out merely because the executors are all dead and the particular land, on which the testator desired the dispensary to be erected, is not available for the purpose.

The next point Mr. Knight raises is that his clients are blood relations and are entitled to have the administration of the charity. On that point I am unable to accept the learned Counsel's argument; the testator meant the charities to be established by his executors and they were to carry out the charity, when established. That was a personal discretion vested in the executors. The testator must have contemplated that some day his executors would die, and it cannot be said he meant the charity to come to an end on their death, moreover the testator by his Will provides that the executors should have power to make over the charities to Government. There are no words in his Will nor is there any intention that this particular charity is to remain under the administration of any of the testator's relatives.

The last point is with regard to accumulations of interest on the fund in Court. These funds stand in Court to the credit of a separate account. It is well established that when monies have been lodged in Court to the credit of a separate account, they become separated from the general estate. The interest therefore accruing on a fund standing to a separate account does not form part of the residue, but goes so as to increase the fund in Court. Simply because the charity has not been established earlier does not render the interest, which has

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accrued on the fund in Court, applicable as a portion of the residue of the estate. The accumulations of interest there-fore form part of the capital for the purpose of carrying out the charity. There must therefore be a reference to Chambers to frame a scheme for giving effect to the charity designated by the testator in clause 3 of the Will.

Mr. Knight's clients may appear on the reference.

Attorney for the plaintiff : *Eggar.*

Attorneys for the defendants : *S. D. Dutt and Ghose.*

R. G. M.

APPELLATE CIVIL.

Before Mr. Justice Mitra and Mr. Justice Carnduff.

GOLAB CHAND

v.

JANKI KOER.*

1908

December 17⁴

Saltpetre—Monopoly—Manufacture—Regulation IV of 1814—Effect on the monopoly.

The abolition of the monopoly of the East India Company to the manufacture of saltpetre by Regulation IV of 1814 was not intended to affect the right of a purchaser of the monopoly to realize his dues either in the shape of royalty from the manufacturers or himself to manufacture saltpetre, to the exclusion of all other persons or proprietors of land in the *nimaksayar mahal*.

The right to grant license and realize royalty would not be inconsistent with the abolition of a monopoly.

SECOND APPEAL by the defendants.

In the suit in appeal, Maharani Janki Koer, widow of Maharaja Sir Harendra Kishore Singh Bahadur of Betia, sought for a declaration of her right to a monopoly in the manufacture of saltpetre and collection of saltpetre earth in village Manpura, as well as for an injunction restraining the defendants from infringing the said right. She further prayed for demolition of the salt-*dihi* lately started by the defendants in Pous 1311 F.S. in the said village or for possession of the same with mesne profits. The defendants denied *inter alia* the plaintiff's alleged right to the monopoly. The Munsif decreed the suit and, on appeal, the Subordinate Judge affirmed the decision of the first Court.

Babu Golap Chandra Sarkar (Babu Dwarka Nath Mitra and Babu Sarat Kumar Mitra with him) for the appellant. Nimaksayar is not like other sayar lands. The monopoly was abo-

* Appeal from Appellate Decree No. 1353 of 1907, against the decree of Umesh Chandra Sen, Additional Subordinate Judge of Mozufferpore, dated 27th March 1907, affirming the decree of Ashutosh Ghosh, Munsif of Motihari, dated 27th January 1906.

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lished—*vide* the letter from the Government to the Board of Commissioners in Bihar and Benares, dated 24th December 1818. What would be the effect of this on the *nimaksayar* right? The onus is on the Government or the party claiming under it to prove reservation? We have all possible rights under the zemindari grant. [Mitra J. The main question is 'how did later legislation affect the Permanent Settlement' ?]

Hon. Dr. Rash Behary Ghose (Babu Naliniranjan Chatterjee with him) for the respondent. Monopoly has no connection with the title of the Raj to the salt *mahal*. The *nimaksayar mahal* is a separate *mahal*. It was like an incorporeal hereditament. Government cannot settle land with me and receive revenue, and then by legislative enactment affect my right. [Mitra J. Cannot the Government in its legislative capacity weaken the effect of its previous executive action?] But what of my title to the land? Although the defendants are the owners, the plaintiff has the sole right to the saltpetre lands. [Mitra J. Was the *nimaksayar mahal* separated from the estate? If it was, the Raj could have an injunction.] The right to the land also is mine. It is an exclusive right. [Mitra J. Look at the prayers in your plaint.]

Babu Golap Chandra Sarkar in reply. The Permanent Settlement merely declared the Zemindars to be the actual proprietors. [Mitra J. But the Government had its share. It had rights to settle land.] Yes, the Government settled the revenue arising out of *nimaksayar* with the Mukerjees, and they sold their right to the Betia Raj. The monopoly is now gone. The *Raj* may have *Malikana*. After the passing of Regulation IV of 1814, the Government has only a share in the salt revenue, and it can settle that share only. The respondent can claim only a portion—*vide* Hunter's Statistical Accounts, Vol. XIII, pages 289, 349, and Regulation VIII of 1819, Section 12. The old Hindu law is applicable, see Regulations XXXVII and XIX of 1793.

MITRA AND CARNDUFF JJ. We have no doubt on the facts proved in the case that the plaintiff as the present proprietress of the Betia Raj is entitled to a declaration of her right as the Permanent Settlement-holder under Government of the saltpetre *mahal* of Sarkar Champaran, which includes the village Manpura owned by the defendant appellant. The settlement papers of 1791 and 1793 conclusively prove that the *nimaksayar mahal* of Sarkar Champaran along with the villages Sangrampore and others was settled with the Mukerjees, and that the revenue for the *nimaksayar mahal* was separately assessed at Rs. 2,293 and odd. The revenue was regularly paid to the Government in later years. The mahal passed to the Betia Raj by purchase in 1804, and the predecessors of the plaintiff were in possession and paid regularly the Government dues according to the assessment made by the Government.

It is also clear from the documents and the findings of fact arrived at by the lower appellate Court that the right to the *nimaksayar* dues was exclusive, and that what passed by the settlement with the Mukerjees and the purchase of their right by the Betia Raj was the right which was exercised by the East India Company by virtue of the grants made by the Nawabs Mir Zafer and Kassim Ali and the Dewani of the 12th August 1765. The plaintiff, it appears to us, is entitled to exercise the same right.

Regulations VIII of 1812 and IV of 1814 were not intended either to extend or to limit the right which the Betia Raj had to the *nimaksayar mahal* in Sarkar Champaran. The abolition of the monopoly of the East India Company by the latter Regulation was not intended to affect the right of the Raj to realise its dues either in the shape of royalty from the manufacturers or itself to manufacture saltpetre to the exclusion of all other persons or proprietors of land in Sarkar Champaran. The right to grant licenses and realise royalty would not be inconsistent with the abolition of monopoly.

There is, however, no distinct finding in the judgment of the lower appellate Court as to the way in which the East India Company exercised the right it had under the grants from the

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Nawabs before settlement with the Mukerjees, and there is also no finding as to how, at or about the settlements in the last decade of the eighteenth century, the right was exercised by the settlement-holders. We do not think that the reliefs claimed in the plaint or any of them should be granted without a distinct finding as to the mode of user.

It is conceded by Dr. Rash Behari Ghose that the plaintiff is not entitled to a declaration as to her right to a monopoly in the manufacture of saltpetre. It is also conceded that the second prayer in the plaint, *i.e.*, the prayer for injunction, cannot be founded on the ground of the existence of a right to a monopoly. She may have an injunction on the ground of her exclusive right, if any, as conferred by the settlement under which she holds the *nimaksayar mahal*. She cannot also be allowed the third relief claimed in the plaint, *i.e.*, the demolition or possession of the Dihi at Manpura. Her prayer for damages must follow the finding as to the mode of the user. We do not, however, see how she may get a decree for mesne profits as allowed by the lower Courts.

We, therefore, direct a remand to the lower appellate Court for ascertaining from the evidence on the record and such other evidence as the parties may produce, the precise way in which the exclusive right claimed by the plaintiff was exercised in the past. The decree should be in accordance with the finding that may be arrived at and the observations made above.

The costs of this appeal as well as those of the lower Courts will abide the result.

Case remanded.

S. M.

ORIGINAL CIVIL.

Before Mr. Justice Woodroffe.

IN THE MATTER OF JOGENDRA NATH MUKHUTI
AND OTHERS.*

1908
August 13.

Lease—Covenant—Calcutta Municipal Act (Bengal Act III of 1899), s. 556—Tenders, invitation of, when not obligatory—Specific Relief Act (I of 1877), s. 45—Mandamus.

Section 556 of the Calcutta Municipal Act enables the Corporation to lease any property vested in them on any terms they think fit, without previously calling for any tenders: however the form of a lease cannot be given to a transaction, which properly falls under section 88 of the Act.

Although a covenant in a lease, or in respect of a lease, is in a sense a contract; if it relates to the demised premises and is not independent of them, it does not fall within the purview of section 88 of the Calcutta Municipal Act, and it is not obligatory upon the Corporation to call for tenders in respect of such a contract.

CIVIL RULE.

THIS was an application under section 45 of the Specific Relief Act for an order in the nature of a *mandamus* to compel the Municipal Corporation of Calcutta to call for tenders in terms of section 88 of the Calcutta Municipal Act, in respect of the removal of the city refuse, before giving effect to the proposals of the Special Committee appointed by it to consider the matter.

Certain lands and tenements situate at Dhappa, in the Suburbs of Calcutta, known as the "Dhappa Square Mile" with certain other lands, fisheries and fish hat contiguous thereto were vested in the Corporation of Calcutta, and had been used by them for a number of years for the purpose of depositing the refuse of the city.

On May 1st, 1879, one Bhoba Nath Sen obtained a lease of a portion of the said lands and of certain fishing rights from the Corporation and in the following May obtained a lease of the

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remaining portion, thus becoming the sole lessee of the whole of the lands and tenements and fishing rights and fish hâť for a period of 19 years ending with the 30th April 1899. On the expiry of the above lease, Bhoba Nath Sen obtained a renewal for a further period of 10 years from the 1st January 1900 to the 31st December 1909, at a consolidated annual rental of Rs. 13,263.

With regard to the deposit of the city refuse at the "Dhappa Square Mile," it was alleged that it had been the invariable practice of the Corporation to enter into separate agreements, independent of the lease of the premises, for unloading the waggons of refuse at the "Square Mile." Such a separate agreement was entered into with Bhoba Nath Sen for a period terminating with his renewed lease on December 31st, 1909, at the annual cost to the Corporation of about Rs. 42,000.

On the 29th October 1906, Bhoba Nath Sen proposed to the Chairman of the Corporation certain schemes for the improvement of the "Square Mile" and the fisheries attached, which he was willing to undertake, in consideration of the Corporation renewing the current lease on its expiry, for a further term of 20 years "on a fair and equitable rental." In connection with these proposals a report was submitted by the Secretary to the Corporation, dealing with the history, the character and the previous use made of the "Square Mile." On the 18th December 1907, at a meeting of the Corporation, a Special Committee was appointed to consider the proposed schemes, and on the 8th January 1908, the Corporation further referred to the Special Committee the question of the charges of unloading the refuse-waggons.

It appears that offers were received by the Corporation from others besides Bhoba Nath Sen, in respect of the lease of the premises and the work of unloading the waggons, including an application from Jogendra Nath Mukhuti on the 2nd March 1908. All these offers were rejected by the Special Committee, who finally decided on the 8th May 1908 that no tender should be invited for the lease of the premises and the work of unloading the waggons. Thereafter at the

instance of the Special Committee, the Chairman drew up a report recommending to the Corporation that in order to save unnecessary cost and trouble the lease of the Square Mile and the contract to unload the waggons should be combined, and that a lease of the "Square Mile" should be granted to Bhoba Nath Sen for a period of 22 years, on certain terms, one of the terms being that the lessee should undertake to do the work of unloading the waggons without receiving any separate payment. This report was confirmed by the Corporation on the 22nd July 1908.

Thereupon, on the 28th July 1908, Jogendra Nath Mukhuti, with two rate-payers of the Corporation, alleging that the Chairman and the Corporation had acted *ultra vires*, applied for and obtained a rule on the Corporation of Calcutta, the General Committee, and the Chairman of the Corporation, and Bhoba Nath Sen to shew cause "why the Chairman and the Corporation should not forbear from accepting the offer of Bhoba Nath Sen, until after tenders had been invited in accordance with law and why the General Committee of the Corporation should not give notice by advertisement in local newspapers inviting tenders for the contract for unloading waggons of refuse at the lands called the Dhappa Square Mile, and for the lease of the lands and tenements situate at Dhappa known as and called the Dhappa Square Mile and also for the lease of certain other lands and fisheries and fish hat contiguous thereto and why the Chairman and the Corporation should not otherwise proceed in accordance with law."

The Rule came on for hearing on the 10th August 1908.

The Advocate-General, Mr. Sinha (Mr. Stokes with him) for the Corporation. In the circumstances of this matter, the Corporation has full discretion to grant a lease of the premises and to arrange for the unloading of the refuse-waggons without inviting tenders. Section 88 of the Calcutta Municipal Act has no application. The work of unloading is intimately connected with the demised premises, and the

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contract for unloading is a covenant of the lease, and is not such as falls within the purview of section 88. *The Queen v. Gaskarth* (1) was referred to. A similar section in the Public Health Act (38 and 39 Vict. C. 35) has been held to be merely directory. See *Soothill Upper Urban Council v. Wakefield Rural Council* (2). Under section 556 of the Calcutta Municipal Act, the Corporation has full power to grant a lease of any premises vested in them, on such terms as they may think fit.

Mr. B. C. Mitter (*Mr. B. L. Mitter* with him) for Bhoba Nath Sen supported the argument of the Advocate-General.

Mr. Chakravarti (*Mr. Lahiri* with him) for Jogendra Nath Mukhuti in support of the rule. The Chairman and the Corporation have acted *ultra vires*, and this Court has jurisdiction to grant relief to a party aggrieved. The proper form of seeking relief is by an application under section 45 of the Specific Relief Act for an order in the nature of a *mandamus*. See *The Bank of Bombay v. Suleman Somji* (3), *In re Tarabai* (4), *London County Council v. Attorney General* (5). The facts of this case are covered not by section 556 but by section 88 of the Calcutta Municipal Act. The true nature and not the form of the transaction must be regarded. See *In re Watson* (6). Instead of the contract for the disposal of the refuse being a term in the lease, the lease itself was ancillary to the main provision in the engagement, which was for the disposal of the refuse of Calcutta. It was sought to evade the operation of section 88, by representing the transaction under the colour of a lease, thus committing a fraud on the Act. See Maxwell on Statutes, 3rd edition, pages 171, 186, 475; Craies on Statutes, 4th edition, pages 77, 223, 224.

Cur adv. vult.

(1) (1880) L. R. 5 Q. B. D. 321.

(2) [1905] 2 Ch. 516.

(3) (1908) 12 C. W. N. 825.

(4) (1905) 7 Bom. L. R. 161.

(5) [1902] A. C. 165.

(6) (1890) L. R. 25 Q. B. D. 27.

WOODROFFE J. This is an application for an order in the nature of a *mandamus* to compel the Corporation to call for tenders in respect of the removal of the city refuse before giving effect to the proposals of the Special Committee appointed by it to consider the matter. This work has been done by Babu Bhoba Nath Sen since 1879 and has been carried out to the satisfaction of the Corporation. He has also during this period held a lease of the Dhappa Square Mile into which the refuse is dumped. The Corporation consider that it is advisable that the benefit of the lease and the discharge of the work of unloading should go to and be done by the same person. As the present lessee's lease will expire next year the question of its renewal has been before the Secretary of the Corporation, the Estates and General Purposes Committee and a Special Committee, and they after a full consideration of the matter have reported that it is advisable that the lease of the Square Mile and the work of the removal of city refuse should go together and be granted and made over to Babu Bhoba Nath Sen. The present proposals are however for a different arrangement than heretofore. At the present time Babu Bhoba Nath Sen pays a rental for the land and receives a sum of money for the work done by him. It is proposed now to grant him a lease on the terms that he do the work of unloading without charge. This proposal is about to be put before the Corporation. Another person, who desires to get for himself the contract for the unloading of the city refuse, objects to this being done. He and a ratepayer, whom he has associated with himself, say that the proposal of the Select Committee cannot be accepted without first calling for tenders. If there is a discretion in the matter, then the Corporation have full discretion. They know far better than I do what is the best proposal to adopt in the public interest. There is no reason whatever to suppose that they are not guided solely by the requirements of such interest. The charges made on this head in the petition are ridiculous. The point however before me is this, and it is a bare point of law, *viz.*: Is the discretion of the Corporation

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controlled by the provisions of section 88 of the Municipal Act, which requires that in the case of contracts for the execution of any work involving an expenditure of over Rs. 10,000, tenders should be called for. Had there been simply a contract for the unloading of the refuse at a certain charge then no doubt that section would have applied. This is not disputed. But the proposal here is that Babu Bhoba Nath Sen should do the work without charge as a term and condition of a lease of the "Square Mile," which is granted to him upon this and other considerations. Section 556 enables the Corporation to lease any property vested in them (and the Square Mile is so vested) on any terms they think fit. No tenders are required before the property is leased. No doubt an agreement for a lease is a contract though the lease when completed is a conveyance. Further, a covenant in the lease is a contract, and in this sense the covenant in respect of the lease is a contract. The question, however, is whether it is a contract within the meaning of section 88 and governed by it. It is of course conceded that the law cannot be evaded by giving the form of a lease to a transaction which properly falls under section 88. Whether this has been done must be determined on the facts of each particular case. A test, which may be applied, is this:—Is the covenant one which relates to the demised premises, or is it independent of them. In this case it so relates. The covenant and the lease are closely related to one another. The refuse is unloaded into the Square Mile with a view not only to the disposal of the former, but the reclamation of the latter. And experience has shewn that this reclamation can be best effected when both the duty of unloading and the benefits of the lease of the land, are cast upon and vested in the same person. The fact which is relied on by the applicant that the lease is terminable upon a different mode being agreed to as to the disposal of the refuse so far from destroying the relation to which I have referred, on the contrary, confirms it. In my opinion the present case is not governed by section 88 and it is not obligatory upon the Corporation to call for tenders. To hold

otherwise would be to prohibit the Corporation from granting a lease without calling for tenders which the law does not require. The rule is accordingly discharged with costs.

As the rule was served on Babu Bhoba Nath Sen and as in my opinion the latter was entitled to be heard separately, separate costs are allowed to him and to the other party to the rule, the Corporation.

Rule discharged.

Attorney for the applicants : *S. C. Mitter.*

Attorney for the Corporation : *M. L. Sen.*

Attorneys for the lessee : *G. C. Chunder & Co.*

J. C.

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APPELLATE CIVIL.

*Before Sir Francis W. Maclean, K.C.I.E., Chief Justice and Mr.
Justice Doss*

1908
May 6.

HARI CHARAN SANT

v.

KAILASH CHANDRA BHUYAN.*

*Malicious prosecution—Malice—Reasonable and probable cause—Damages—
Liability of complainant.*

Where it is found that the defendant not only lodged the complaint before the police, but virtually fabricated false evidence to procure the plaintiff's conviction, and there was a want of reasonable and probable cause for the institution of the criminal case, the defendant must be held to be the real and virtual prosecutor and liable for damages.

Bhul Chand Patro v. Palun Bas (1) followed.

SECOND APPEAL by the defendant.

Hari Charan Sant, the defendant-appellant, charged Syama Charan Bhuyan and Kailash Chandra Bhuyan in two cases under section 406 of the Indian Penal Code, with having committed criminal breach of trust in respect of five bags of paddy worth about Rs. 14. The Deputy Magistrate of Alipur found the accused not guilty and acquitted them. Thereafter the two accused instituted two suits for damages for malicious prosecution against the said Hari Charan Sant at whose instance the criminal prosecution was instituted by the Crown.

The Munsif held that the defendant did not set the Magistrate in motion and could not be regarded as the prosecutor and concluded from the facts of the case that there was reasonable and probable cause for the institution of the criminal case. On appeal, the Subordinate Judge upset the finding and the judgment of the Munsif, characterising the evidence in the

*Appeals from Appellate Decrees, Nos. 596, etc. of 1907, against the decrees of Annada Prasad Bagchi, Subordinate Judge of 24-Parganas, dated 18th December 1906, modifying the decrees of Pankaja Kumar Chatterjee, Munsif of Alipur, dated 17th May 1906.

(1) (1903) 12 C. W. N. 818, foot-note.

criminal case as false and finding that there was no reasonable and probable cause for lodging the criminal complaint, that the defendant took an active and material part in the prosecution, and that the Magistrate treated the defendant as the virtual prosecutor. He therefore held him liable for damages and allowed Rs. 15 to each of the accused as a *solatium*, besides other amounts for costs for processes and for engaging a mukhtear.

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Babu Shiva Prasanna Bhattacharya for the appellant. Everything depends on the meaning of the word 'prosecute.' See *Clarke and Lindsell on Torts*, page 641. *Narasinga Row v. Muthaya Pillai* (1), *Dudhnath Kandu v. Mathura Prasad* (2), *Gunnessh Dutt Singh v. Mugneeram Chowdhry* (3) are all in my favour. [Maclean C. J. But the findings of fact are against you.]

I did not set the law in motion. There is no charge that I misled the police. *Bhul Chandra Patro v. Palun Bas* (4) proceeds on the basis that there was want of reasonable and probable cause and is distinguishable from this case. Here the case is the other way. *Abrath v. The North Eastern Railway Company* (5) cited in the case cited above has no bearing. [Maclean C. J. *Fitz-John v. Mackinder* (6) is against you.] *Wyatt v. White* (7) is in my favour. My client was interested in watching the proceedings and therefore appointed a mukhtear. It is really the Court inspector, who prosecuted. See also Criminal Procedure Code, sections 593 and 594.

Mr. G. Sarkar for the respondents was not called upon.

MACLEAN C. J. This is an action for malicious prosecution. The defendant, it appears, gave information to the police, upon which the plaintiff was arrested and brought before the Magistrate and subsequently acquitted. The case comes

(1) (1902) I. L. R. 26 Mad. 362.

(3) (1872) 11 B. L. R. 321.

(2) (1902) I. L. R. 24 All. 317.

(4) (1903) 12 C. W. N. 818, foot-note.

(5) (1883) L. R. 11 Q. B. D. 440; L. R. 11 App. Cases 247.

(6) (1861) 9 C. B. N. S. 505, 533.

(7) (1860) 29 L. J. Exch. D. 193.

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before us on second appeal, and we must take the findings of the Judge in the Court below as binding upon us. That Court has decided against the appellant and decreed a very small amount of damages. The appellant appeals: and he says that the action would not lie, that he was not the prosecutor, but that the police were the prosecutors. Now, what are the findings of the Court below? There are findings of malice, findings of want of reasonable and probable cause for the institution of the criminal case. The Judge also finds, "The defendant did not only lodge the complaint before the police, but did virtually fabricate false evidence to procure the plaintiff's conviction. The defendant did actually appoint a mukhtear to prosecute the plaintiff. The mukhtearnamah shows for what object the mukhtear was appointed. It was clearly stated in it that the mukhtear was to 'prosecute,' and the evidence is that the mukhtear did actually cross-examine the defence-witnesses before the Magistrate: and, as stated before the Magistrate, treated the defendant as the virtual prosecutor." I think upon these findings it is clear that the defendant was the real and virtual prosecutor. The case is identical with the case of *Bhul Chand Patro v. Palun Bas* (1) and in the judgment in that case some English authorities are referred to, which support the view of the present lower Appellate Court. I might almost avail myself of the language of Chief Justice Cockburn in the case of *Fitz-John v. Mackinder* (2), where he says, "I can only say that in my opinion it would be a lamentable reproach to our law if a claim for redress for so grievous a wrong could be defeated by legal difficulties of a purely technical character." I think in this case it would be lamentable if, taking the facts as found, it were held that the plaintiff had no redress.

The appeals, therefore, fail and must be dismissed with costs.

Doss J. I agree.

Appeals dismissed.

(1) (1903) 12 C. W. N. 818. (2) (1861) 9 C. B. N. S. 533.

APPELLATE CRIMINAL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and
Mr. Justice Carnduff.

FANINDRA NATH BANERJEE

v.

EMPEROR.*

1908

November 28

Charge—Jury—Heads of charge—Contents of, and time of recording heads of charge—Misdirection of Jury—Omission to read whole of the depositions of witnesses—Omission to direct Jury to draw a “presumption” against the prosecution, when certain witnesses were not called—Direction in rioting cases—Oral proof of statements by witnesses to the police—Criminal Procedure Code (Act V of 1898), ss. 162, 297, and 367—Circular Orders of the High Court, Chap. I, Order 59—Evidence Act (I of 1872) ss. 114, Ill. (g) and 157—Indian Penal Code (Act XLV of 1860) ss. 141, and 302.

It is not necessary that the heads of charge to the Jury should be reduced to writing before delivery of the charge, but they ought to be written as soon as possible thereafter and when the facts are fresh in the Judge's mind.

The heads of charge should represent with absolute accuracy the substance of the charge, and be such as to enable the High Court on appeal to see distinctly, whether the case was fairly and properly placed before the Jury. *Circular Orders of the High Court, Chap. I, Order 59*, referred to.

It is not incumbent on the Judge to read the whole of the depositions of the witnesses to the Jury. It is enough that references have been made to them so as to sufficiently attract their attention to them.

It is not necessary that the Judge should direct the Jury, in so many words, that the omission of the prosecution to call certain witnesses raised a “presumption,” under the Evidence Act (I of 1872), s. 114, Ill. (g), that their evidence would be unfavourable to the Crown, if he has pointed out that the Jury might properly draw any inference they pleased from such omission.

Section 141 of the Penal Code is sufficiently explained to the Jury, if the Judge has told them that, if five persons go in a body with the common object of murdering a man, and if he is killed in the prosecution of the common object, then, no matter who struck the fatal blow, all are equally guilty of murder under ss. ³⁰²/₁₁₄ of the Penal Code.

Section 162 of the present Criminal Procedure Code prohibits the use of the record of the statement of a witness taken under section 161 as evidence, but does not over-ride the general provisions of the Evidence Act as to proof of such statement by oral evidence, and such statement is admissible

* Criminal Appeals Nos. 693—695 of 1908, against the order of L. Palit, Sessions Judge of Jessore, dated the 5th of June 1908.

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under s. 157 of the Act in corroboration of the evidence of the witness given at the trial.

The proviso to section 162 of the present Code is confined to, and is for the benefit of, the accused.

Queen-Empress v. Bhairab Chunder Chuckerbutty (1) distinguished. *Emperor v. Narayan Raghunath Patki* (2), per Beaman J., dissented from. *Reg. v. Uttamchand Kapurchand* (3), and *Empress v. Kali Churn Chunarí* (4) referred to.

CRIMINAL APPEALS.

THE appellants were tried before the Sessions Judge of Jessore with a Jury who, by a majority of four to one, convicted them under sections $\frac{302}{149}$ of the Penal Code. The Judge, accepting the verdict of the majority, sentenced the accused to transportation for life on the 5th June 1908, and they now appealed to the High Court.

Mr. K. N. Chowdhry (*Babu Narendra Kumar Bose* with him in No. 693, and *Babu Monmotho Nath Mukerjee* in Nos. 694 and 695) for the appellants. The heads of charge were not written out till a month after. This is not contemplated by the law. Refers to s. 367 of the Code. The Judge has misdirected the Jury on several points. He has not read out the medical evidence to them, nor has he told them that the omission of the prosecution to call important witnesses raised a presumption that their evidence would have been unfavourable to the Crown: See the Evidence Act s. 114, *III.* (g). His direction to the Jury on s. 141 of the Penal Code is not explicit. He has further wrongly admitted oral evidence of the statement of a witness made to the police during the police investigation. Such statement cannot be used under s. 162 of the Code to corroborate the witness giving evidence in Court: See *Queen-Empress v. Bhairab Chunder Chuckerbutty* (1) and *Emperor v. Narayan Raghunath Patki* (2).

Babu Atulya Churn Bose and *Babu Bunkim Chunder Sen* for the Crown. S. 367 does not require a written judgment

(1) (1898) 2 C. W. N. 702.

(3) (1874) 11 Bom. H. C. 120.

(2) (1907) I. L. R. 32 Bom. 111.

(4) (1881) I. L. R. 8 Calc. 154.

in such cases. The medical evidence was substantially dealt with in the Judge's charge. S. 162 of the Code does not over-ride the general rule in s. 157 of the Evidence Act. See *Reg. v. Uttamchand Kapurchand* (1) and *Empress v. Kali Churn Chunarri* (2).

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MACLEAN C. J. and CARNDUFF J. These cases were tried before a Judge and Jury. The Judge agreeing with a majority of the Jury, four to one, convicted the prisoners of an offence under section 302 read with section 149 of the Indian Penal Code, and sentenced them to transportation for life. The appeals, therefore, cannot succeed, unless the appellants can satisfy us that there was some misdirection by the learned Judge in his charge to the Jury. The first criticism upon the action of the Judge is that, whilst the verdict was delivered on the 29th May 1908, and the sentence was passed on the 5th June following, his charge to the Jury was not written out until the 29th June. Reference has been made to section 367 of the Code of Criminal Procedure. That section does not assist the appellants, for there is a proviso that "in trials by Jury, the Court need not write a judgment, but the Court of Session should record the heads of the charge to the Jury." There is nothing there as to when it must be written, as in the case of a judgment by the Court dealt with in a preceding part of the section. If we refer to the Circular Orders of this Court, Chapter I, Order 59, we find an express order to the effect that it is not necessary that the direction to the Jury should be reduced to writing before delivery, but it is essential that the "heads of charge" (section 367) placed upon the record should represent with absolute accuracy the substance of the charge, and be such as to enable the High Court, in the event of an appeal, to see distinctly, whether the case was fairly and properly placed before the Jury. Whilst, therefore, there is nothing in the point to assist the appellants, we think it is very unsatisfactory that the charge to the Jury was not, in the case before us, written out until

(1) (1874) 11 Bom. H. C. 120.

(2) (1881) I. L. R. 8 Calc. 154.

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the 29th June, nearly three weeks after the sentence. We are strongly of opinion that in these cases such charge ought to be written out as soon as possible after the charge to the Jury has been actually delivered, and when the facts of the case are fresh in the mind of the Judge.

The first point of misdirection is that the Judge did not read the medical evidence to the Jury, but one has only to look at the charge to see that there were frequent references to the medical evidence. There is nothing that makes it incumbent upon any Judge to read the whole of the depositions of the witnesses to the Jury, and, we think, in the present case the medical evidence was sufficiently attracted to their attention.

Then it is said that the Judge did not sufficiently warn the Jury that the omission of the prosecution to call certain witnesses, and particularly the palki-bearers, raised a presumption that their evidence would be unfavourable to the prosecution, and reference is made to section 114 *III.* (g) of the Evidence Act. It is perfectly true that in his charge we do not find the word "presumption," but again and again the Judge has pointed out to the Jury that they might properly draw any inferences they pleased from the fact that these witnesses were not called. There is no substance in this point.

Then it is suggested that the Judge did not sufficiently explain to the Jury the provisions of section 141 of the Indian Penal Code. But it appears from a note made by the Judge that in the charge to the Jury they were told that, if the five persons went in a body with the common object of murdering Banku Behari, and, if he was killed in the prosecution of that common object, then, no matter which of them struck the blow or blows, which caused death, all would be equally guilty of murder under section 302, read with section 149 of the Indian Penal Code. We scarcely think we should be justified in saying, if the Judge, as appears, so addressed the Jury, that there was any real misdirection on this point.

There only remains the question whether the Court below was wrong in admitting oral evidence of a statement made to

the police by a witness to corroborate that witness's deposition at the trial. The appellant relies upon two reported cases, namely, *Queen-Empress v. Bhairab Chunder Chuckerbutty*, (1) and the Full Bench case of *Emperor v. Narayan Raghunath Patki* (2).

In the former it was held that the general provisions of section 157 of the Indian Evidence Act of 1872 were over-riden by the special provisions of section 162 of the Code of Criminal Procedure. But the Code then under consideration was the Code of 1882; the language of the corresponding section 162 of the present Code is materially different. That case is, consequently, distinguishable. In the other case the point now raised was not decided by the Full Bench in Bombay or before the Court, though there are some *obiter dicta* upon it by one of the learned Judges, Mr. Justice Beaman.

The language of the respective Codes of 1872, 1882 and 1898 are different. In that of 1872 section 119 enacted:—"No statement so reduced into writing shall be signed by the person making it, nor shall it be treated as part of the record or used as evidence." Section 162 of the Code of 1882, on the other hand, was thus expressed:—"No statement, other than a dying declaration, made by any person to a police officer in the course of an investigation under this Chapter shall, if reduced to writing, be signed by the person making it or be used as evidence against the accused." The present section 162 provides that:—"No statement made by any person to a police officer in the course of an investigation under this Chapter shall, if taken down in writing, be signed by the person making it, nor shall *such writing* be used as evidence."

In the case of *Reg. v. Uttamchand Kapurchand* (3) it was held that the provisions of section 155 of the Indian Evidence Act of 1872 were not controlled by section 119 of the Act of 1872, the Criminal Procedure Code then in force. This view was approved of by Wilson J. in *Empress v. Kali Churn Chunarri* (4). The point may be shortly summed up thus. Sec-

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(1) (1898) 2 C. W. N. 702.

(3) (1874) 11 Bom. H. C. 120.

(2) (1907) I. L. R. 32 Bom. 111.

(4) (1881) I. L. R. 8 Calc. 154.

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tion 157 of the Evidence Act allows the statement by way of corroboration to be proved. Section 162 of the Criminal Procedure Code, now in force, enacts that, if any such statement as is now under consideration is taken down in writing, the writing cannot be used as evidence. If it be said that it is a refinement to hold that the writing cannot be admitted, but that the statement, if not reduced to writing, can, the answer is that the Legislature has chosen to alter its language in section 162 of the present Criminal Procedure Code, drawing a distinction between the statement and the writing.

We may add that we have not overlooked the proviso to the present section, but that is confined to and for the benefit of the defence, as the prosecution have free access to all the police papers.

There is nothing, therefore, in the special provision of the existing Code to over-ride the general provisions of the Evidence Act as to the proof by oral evidence of former statements; consequently the oral evidence here objected to was rightly admitted by the lower Court. We may add that, apart from this, there is sufficient evidence on the record to sustain the conviction.

The result is that we affirm the conviction and sentences and dismiss these appeals.

Appeals dismissed.

E. H. M.

APPELLATE CIVIL.

Before Mr. Justice Sharfuddin and Mr. Justice Coxe.

UDOY CHANDRA KARJI.

v.

NRIPENDRA NARAYAN BHUP.*

1909
Jan. 13.

Bengal Tenancy Act (VIII of 1885) ss. 50, 106—Presumption as to amount of rent—Permanent tenure.

The plaintiff's predecessors held a tenure from long before the Permanent Settlement at a rental of Rs. 4-8-0. In 1884 the tenure was split up into two tenancies each bearing a rental of Rs. 2-4-0. In the Record of Rights of 1906 the tenure was described as not held at a fixed rent. The plaintiff brought a suit under s. 106 of the Bengal Tenancy Act claiming the tenure to be a permanent one, and the rent as fixed in perpetuity :—

Held, that the old tenure did not still exist in the shape of the two new tenancies, the land held by the tenure-holder being affected by the division, under clause (3) of section 50 of the Bengal Tenancy Act.

SECOND Appeal by Uday Chandra Karji, the plaintiff.

The plaintiff was a tenure-holder in respect of a *jote* paying a rental of Rs. 2-4-0. In the record of rights, which was prepared in 1906, the tenure in question had been recorded by the Settlement Officer as not permanent and not held upon a fixed rent. Thereupon, the plaintiff brought a suit under section 106 of the Bengal Tenancy Act claiming the rent to be fixed in perpetuity and not liable to enhancement.

It appears, that the plaintiff's predecessors held the original tenure, since long before the Permanent Settlement, at a rental of Rs. 4-8-0 for the entire tenure. In 1884 the tenure was split up into two, each bearing a rent of Rs. 2-4-0.

The defendants contended that the rent was not fixed, nor was the tenure permanent.

The Settlement Officer having found that the plaintiff had held the tenure practically on an unaltered rental since the

* Appeal from Appellate Decree, No. 2364 of 1907, against the decree of Bernard V. Nicholl, Special Judge of Rungpur, dated June 18, 1907, reversing the decree of Sayed Ejhar Hussain, Settlement Officer of that District, dated Dec. 22, 1906.

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time of the Permanent Settlement, gave a decree to the plaintiff in the terms prayed for.

The defendants appealed. The learned Special Judge set aside the decree of the first Court and allowed the appeal, observing as follows :—

“ The conclusion arrived at by the Settlement Officer was faulty, inasmuch as he found that the tenure held by the tenant at Rs. 2-4-0 was part of one which was held at the time of the Permanent Settlement at Rs. 4-8-0, it having been split up into two since that Settlement.

“ Although the aggregate rental of the two tenures so created might not be more than the rental of the original tenure, yet the effect of the division was to create two tenures, that is to say, the tenure held by the plaintiff at Rs. 2-4-0 was a new tenure, which came into existence since the Permanent Settlement, and consequently its rent was variable. The Settlement Officer seemed to have overlooked that section 50, clause (3) of the Bengal Tenancy Act, applied only to the holding of a “ raiyat ” and not to that of a “ tenure-holder.”

From this judgment the plaintiff appealed to the High Court.

Babu Hem Chandra Mitter, for the appellant. The facts proved shew that there was no change in the rent or the rate of rent ; for the sake of convenience the original tenure, which was held at Rs. 4-8-0, was divided into two parts bearing an equal *jama* of Rs. 2-4-0. The plaintiff tenure-holder would be entitled, therefore, to the benefit of the presumption under clause (2) of section 50 of the Bengal Tenancy Act. The following cases were referred to : *Soodha Mookhee Dassee v. Ramgutte Kurmocar* (1), *Sheikh Mongola v. Kumud Chunder Singh* (2), *Raj Kishore Mookerjee v. Hureehur Mookerjee* (3) and *Kasheenath Lushkur v. Bamasoonduree Debia* (4).

The Advocate-General (Hon'ble Mr. S. P. Sinha), (*Babu Basanta Kumar Bose*, *Babu Mukunda Nath Roy* and *Babu Atul Chandra Dutt* with him), for the respondents. The judgment of the Special Judge is quite sound. Section 50 of the Bengal Tenancy Act deals with the protection as against enhancement of rent. Any person claiming that protection must prove that he held the tenure at a rent never changed

(1) (1873) 20 W. R. 419.

(2) (1900) 5 C. W. N. 60.

(3) (1868) 10 W. R. 117.

(4) (1868) 10 W. R. 429.

from the time of the Permanent Settlement. When a tenure is split up since the original settlement, it becomes a new contract. In this case the settlement is split up into two, and it becomes two contracts in the place of one original contract. Formerly, one suit was necessary for realization of the arrears of rent, now two suits have to be brought for the same purpose since the splitting up of the rent. The tenure was divided into two in 1884, and hence the protection under section 50 of the Tenancy Act cannot be claimed in this case. Under clause (3) of section 50 of the Act a tenure-holder cannot claim that protection.

Babu Hem Chandra Mitter, in reply.

SHARFUDDIN AND COXE JJ. The plaintiff is the appellant. A record of rights having been prepared the plaintiff was recorded in it as a tenure-holder and his tenure as not held at a fixed rent. He then brought a suit under section 106 of the Bengal Tenancy Act before the Settlement Officer, who decreed the suit and held that the tenure of the plaintiff was very old, in fact, existing from a period of 150 years before 1894. On the defendant appealing to the Subordinate Judge, that learned Officer held that, inasmuch as the original tenure, of which the rent was 4 Rupees 8 annas, was split up into two tenancies in 1291 (1884), that old tenure ceased to exist and under the new contract instead of that old tenure there sprang up two new tenancies at the rental of Rs. 2-4-0 each. On that ground he held that the plaintiff was not entitled to claim that his tenure had existed from the time of the Permanent Settlement.

Our attention has been drawn to clause (2) of section 50 of the Bengal Tenancy Act by the learned pleader for the plaintiff appellant, and it has been contended that the presumption arises in favour of the plaintiff's contention, under that section. But we find that clause (3) of that section, which is a special protection for raiyats, provides that the operation of section 50 so far as it relates to lands held by a raiyat shall not be

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affected by the fact of the land having been separated from other land, which formed with it a single holding. The plaintiff's predecessors held under a contract with the landlord with regard to one tenure bearing a rental of Rs. 4-8-0, which in 1884 was split up into two tenancies each bearing a rent of Rs. 2-4-0. It is contended on behalf of the plaintiff that as a matter of fact there has been no change either in the rent or in the rate of rent. What has been done is that, for the sake of convenience, the old tenure has been divided into two bearing an equal *jama*. But as a matter of fact since 1884 there have been two tenancies, not under the contract under which the old tenure was held, but under a new contract between the landlord and the tenure-holder. These two tenancies are two distinct tenancies under a different contract, and for payment of arrears of rent separate suits have to be brought. It cannot be said that the old tenure still exists in the shape of these two new tenancies. The words "so far as it relates to land held by a raiyat" in section 50, sub-section (3) clearly imply that the operation of the section so far as it relates to land held by a tenure-holder, is affected by the separation of the land from other land, which formed with it a single tenure.

Under these circumstances, we think that the judgment of the Special Judge is unassailable. This appeal is accordingly dismissed with costs.

Appeal dismissed.

F. D. B.

ORIGINAL CIVIL.

Before Mr. Justice Harington.

JAMESON & Co.

v.

SCOTT.*

1908

November 10.

Bill of exchange—Return of bill by indorsee to drawer—Re indorsement, whether, necessary—Drawer's right of action against acceptor.

A bill of exchange drawn by J. & Co. to their order was accepted by S. and was endorsed by J. & Co. to C., who discounted the bill. The bill was presented at maturity and was dishonoured, whereupon C. debited J. & Co.'s account with the amount of the bill, and returned the bill to them, but without re-indorsement. On an action by J. & Co. against S. on the bill.

Held, that the drawers had the right to sue the acceptor on the bill, by virtue of being a party to the bill and as suing on the contract contained in the bill between themselves and the acceptor.

ORIGINAL SUIT.

THIS was a suit on a bill of exchange for the sum of £471-4-3, instituted by Messrs. John Jameson, Ltd., the drawers of the bill, against the defendants, the acceptors thereof.

By a written agreement, dated the 3rd September 1906, Messrs. John Jameson, Ltd., a London firm carrying on business as Wholesale Wine Merchants and Distillers, appointed the firm of Messrs. Elliott & Co., of which firm J. W. Scott was a member, their sole agents in India for the term of seven years, for the sale of certain spirits and wines, and it was provided that the defendants should pay for the wines and spirits supplied to them by bill at six months, but that during the first year only the plaintiffs were to renew any of the bills coming due for a further period of six months, if desired by the defendants.

During September 1906 the plaintiffs despatched four consignments of wines and spirits to the defendants. On the 25th September 1906, the plaintiffs drew a bill of exchange to their order for £471-4-3 at six months' sight in respect of these

* Original Civil Suit No. 189 of 1908.

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consignments. The defendants duly accepted this bill payable twelve months after date to save the trouble of renewal, and this extension was assented to by the plaintiffs. The plaintiffs discounted the bill with the bankers Messrs. Cox & Co. and indorsed the bill to their order. A further indorsement appeared on the back of the bill purporting to be made by Cox & Co. in favour of the Allahabad Bank. The bill was presented for payment on maturity, was dishonoured and was duly protested for non-payment. Thereupon Messrs. Cox & Co. debited the account of the plaintiffs with the amount of the bill and returned the bill to the plaintiffs, without re-indorsing the bill in their favour.

The defendants admitted acceptance of the bill and that it was dishonoured on maturity, but took the plea that the plaintiffs had not established any cause of action against the defendants, inasmuch as the bill had been indorsed to Messrs. Cox & Co. or order, and the latter had not indorsed it back to the plaintiffs and that in consequence the plaintiffs had no right to recover on the bill.

Mr. Camell (*Mr. Stokes* with him) for the plaintiffs. The plaintiffs-drawers have the right to sue the defendants-acceptors on the bill. Messrs. Cox & Co. the indorsees returned the bill to the drawers as useless, and by so doing abandoned their rights on the bill. See Byles on Bills, 16th edition, page 200. The plaintiffs' account with Cox & Co. was debited with the amount of the bill, and they looked to the acceptors. Each party to a bill is a principal debtor to every succeeding party and can be proceeded against as such. See Negotiable Instruments Act, sections 35, 37. Nothing has occurred to extinguish the acceptors' liability to the drawers. The indorsement did not amount to an absolute transfer of all the right, title and interest of the drawers in the bill to the indorsees. The drawer is in the position of a surety for the acceptor in respect of an indorsee, and would on payment be relegated to the rights of the indorsee. Again, by section 32 of the Negotiable Instruments Act, "the acceptor of a bill

of exchange at or after maturity is bound to pay the amount thereof to the holder on demand," and section 8 defines the term "holder," within which definition, it is submitted, the plaintiffs come. See also section 59. If the bill had been re-indorsed to the plaintiffs, they would have had the right to sue as indorsees: but without indorsement, they have in their original capacity as drawers a right of action on the bill. See *Simmonds v. Parminter* (1), *Pownal v. Ferrand* (2) and *In re Overend Gurney & Co., Ex parte Swan* (3) and Chitty on Pleading, Vol. II., page 102.

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Mr. C. R. Das (*Mr. B. L. Mitter* with him) for the defendants. When the plaintiffs indorsed the bill by a special indorsement in favour of Cox & Co., all the right, title and interest in the bill passed from the plaintiffs to Cox & Co. Thereupon Cox & Co. alone had the right to sue on the bill. A negotiable instrument can be transferred only in one way, by indorsement and delivery. See *Harrop v. Fisher* (4) and *Whistler v. Forster* (5). Hence, until the bill has been re-indorsed to the plaintiffs, they can have no cause of action on the bill. Otherwise, if after this suit the bill got back into the hands of Cox & Co. they, as indorsees, would still be entitled to sue the acceptor. Even if the bill is considered as in the nature of an actionable claim, under section 130 of the Transfer of Property Act, the transfer of such a claim can only be effected by the execution of an instrument in writing. The plaintiff cannot now purport to sue as a surety, as no such case was made in the plaint.

HARINGTON J. This is an action by the drawer of a bill-of-exchange against the acceptor. It is admitted that the bill was accepted by the defendant and that it was dishonoured at maturity. The bill was drawn to the order of the plaintiff and was indorsed by the plaintiff to the order of Cox & Co.

(1) (1747) 1 Wils. Rep. 185.

(2) (1827) 6 B. & C. 439.

(3) (1868) L. R. 6 Eq. 344, 362.

(4) [1861] Scott. N. S. 186.

(5) [1863] Scott. N. S. 248, 256.

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On the back of the bill there appears a further indorsement purporting to be made by Cox & Co. in favour of the Allahabad Bank, but as to that indorsement no evidence of any sort has been given and so far as the case stands the drawer indorsed the bill to the order of Cox & Co. It has also been proved that Cox & Co. discounted the bill and credited the plaintiff with the proceeds, and when the bill was dishonoured Cox & Co. debited the drawers' account with the amount of the bill. It has also been proved that after dishonour and after the account of the drawer had been debited with the amount of the bill, the bill was returned to the drawer by Cox & Co. Under these circumstances the defendant says that the plaintiff has no right to recover, because the bill was indorsed to Cox & Co. or order, and Cox & Co. have not indorsed it back to the plaintiff. The answer, I think, is that the plaintiff is suing by virtue of being a party to the bill and is suing the acceptor on the contract contained in the bill between himself and the acceptor. From the fact that the drawer's account was debited with the amount of the bill and the bill was sent back to the drawer, I infer that Cox & Co. returned it to the drawer as a bad bill and left the drawer to take any course they thought proper with regard to it, they having protected their loss by debiting the drawer's account with the amount.

Under these circumstances, is the drawer entitled to sue the acceptor? He has possession of the bill. The bill expresses what the acceptor agreed to do as between himself and the drawer. In my opinion the drawer is entitled to sue the acceptor, who has failed to carry out the agreement he entered into under the terms of the bill. It has been argued that, if the holder of a bill is entitled to sue the acceptor, the result would be that, if the bill now got back into the hands of Cox & Co., they, as indorsees, would still be entitled to sue the acceptor. I do not think that argument is well-founded and for this reason:—They would have no greater rights on the bill, if they took it now, than the person from whom they got it; and if they took it from the plaintiff, who had sued for

and recovered judgment on the bill they would not be entitled to recover from the acceptor. The result is there must be judgment for the plaintiff for the amount shown on the bill. There will be interest on the bill from the 28th September 1907 at 6 per cent. and interest on decree at 6 per cent. The defendant must pay the plaintiff's costs.

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Suit decreed.

Attorneys for the plaintiffs : *Orr, Dignam & Co.*

Attorney for the defendant : *M. N. Dutt.*

J. C.

APPELLATE CRIMINAL.

Before Mr. Justice Holmwood and Mr. Justice Ryves.

1908

December 2.

BAIJNATH DHANUK

v.

EMPEROR.*

Rioting—Right of private defence—Use of excessive violence by some members of the assembly—Responsibility of other members continuing in it, and aiding and abetting—Indian Penal Code (Act XLV of 1860), ss. 99, 147, 148, and 326.

If the accused are justified in resisting the theft of their crops, they cannot be considered as members of an unlawful assembly, with the common object to assert a right to the disputed land and crops, because some members thereof may have exceeded the right of private defence; but if some of the members continue in it, after the others have exceeded the right by the infliction of unnecessary violence, and aid and abet the latter, they also must be considered as having exceeded the right.

In the matter of Kalee Mundle (1) referred to.

Where the accused, three of whom were armed with a sword, a *garasa* (scythe) and a *lobanda* (iron-shod stick) respectively, and the rest with *lathis*, went in a large body to a certain disputed land, where the labourers of the opposite party were reaping some *musouri* crops, and attacked them, fatally wounding one and severely injuring another, it was held that the accused who ordered the attack, and those who used the sword, *garasa* and *lobanda* had exceeded the right of private defence, and so also the others, who continued in the unlawful assembly thereafter and aided and abetted the former.

CRIMINAL APPEAL.

THE appellants Baijnath Dhanuk and others were tried before the Sessions Court of Patna by a Jury on charges under sections 304, 326, and 148 of the Penal Code and, except Ram Sahai, also under section 304 of the same Code. The Jury unanimously found Ram Sahai guilty under sections 326 and 148, and the appellants under section 147 of the Code, and acquitted the others. The Sessions Judge agreeing with the Jury convicted Ram Sahai and sentenced him to five and three years' rigorous imprisonment, respectively, on the two charges

* Criminal Appeal No. 705 of 1908, against the order of H. W. C. Carnduff, Sessions Judge of Patna, dated 30th July 1908.

(1) (1882) 10 C. L. R. 278.

proved against him, the appellants Baijnath Dhanuk, Ghansyam Dhanuk and Ganouri Dhanuk to two years' rigorous imprisonment each under section 147, and the other appellants to one year's rigorous imprisonment under section 147 of the Code. All the appellants were further bound down in the sum of Rs. 300 to keep the peace for one year.

The prosecution story was that one Rafiuddin had lands in Bokaila Khanda, which ever since his purchase, 6 years ago, he cultivated as *khud khast*. The accused, who were residents of two neighbouring villages, or their predecessors, at one time held *ryoti jotes* in Bokaila Khanda, but it was alleged that at the time of partition, before Rafiuddin's purchase, they were ousted and their lands converted into *khud khast*, and that Rafiuddin had continued in peaceful possession. It was also the case for the prosecution that the crop of *musouri* growing on the disputed land at the time of the occurrence belonged to him. The accused claimed the land as their *ryoti* holding and asserted that the crop was theirs. On the 20th February 1908, Rafiuddin's *badwaris* and *barahils* proceeded to the land with 40 or 50 labourers armed with small sticks, and cut some *musouri* of one plot, and were cutting the crop of another plot, when a body of men, numbering 100 to 150, who had collected at the *dalan* of the appellant Ghansyam, within sight of the land, went there and declared their intention of removing the reaped crop. The *badwaris* remonstrated, whereupon the appellant, Baijnath, gave an order to beat them and to seize the crop. Ram Sahai, then attacked one Jhummun of the opposite party with a sword, inflicting a mortal wound. The accused Ghansyam attacked Rafiuddin's men with a *garasa* (scythe), Ganouri with a *lobanda* (iron-shod stick) and the rest with *lathis*. The malik Rafiuddin's servants and labourers did not show fight, but ran away leaving Jhummun and Sheocharan on the ground.

Mr. P. L. Roy (*Babu Atulya Charan Bose* with him) for the appellants. The Judge has misdirected the Jury. He should have told them that, if the accused were justified in resisting the theft of their crops, they could not be

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considered as members of an unlawful assembly, with the common object charged, *viz.*, to assert a right to the land claimed by the malik, because some members of that assembly might have exceeded the right of private defence: see *In the matter of Kalee Mundle* (1).

The Deputy Legal Remembrancer (Mr. Orr) for the Crown contended that all the appellants had exceeded the right of private defence.

HOLMWOOD AND RYVES JJ. This is an appeal by Baijnath Dhanuk and six other persons against the convictions and sentences passed by the Sessions Judge of Patna, who, agreeing with the unanimous verdict of the jury, sentenced Baijnath Dhanuk, Ghansyam Dhanuk and Ganouri Dhanuk to two years' rigorous imprisonment, and Mudhu Dhanuk, Dular Dhanuk, Teja Dhanuk and Bijai Dhanuk to one year's rigorous imprisonment each, under section 147 of the Indian Penal Code. They were also bound down to keep the peace in Rs. 300 for one year.

It appears on the allegation of the maliks that they had, at the time of partition, six or seven years ago, ousted the Dhanuks, who admittedly were the cultivating tenants of the lands in dispute, and the maliks in exercise of their alleged right were cutting some unripe *musouri* with the aid of their servants, who do not seem to have been armed with anything more formidable than short sticks. The labourers, who were cutting *musouri*, must have had some kind of cutting instruments for the purpose of reaping the crop. The allegation was that 100 or 200 of the Dhanuks, consisting of the men of the village which claims the land, and some related Dhanuks belonging to another village, came armed, one Ram Sahai with a sword, one Ghansyam with a *garasa*, one Ganouri with a *lobanda* and the rest with *lathies*, and attacked the malik's men. On the order of Baijnath, Ram Sahai stabbed the deceased in the vitals with a sword, and he

fell on the ground. In his dying declaration the deceased named the seven men before us and Bulak and Dahi, the two men, who were not on their trial before the Court of Sessions. He named no others. The Jury convicted all these men under section 147. They also convicted Ram Sahai under section 326 of the Indian Penal Code. The appeal of Ram Sahai was rejected by a Division Bench of this Court on the ground that there could be no possible doubt that he at any rate exceeded the right of private defence. The present appeal appears to have been admitted on the ground, which is the only ground now taken by the learned Counsel for the defence, that the Judge ought to have told the Jury that, if the accused were justified in resisting the theft of their crops, they could not be considered as members of an unlawful assembly, on the common object charged, namely, to assert a right on the land claimed by the maliks, because some members of that assembly might have exceeded the right of private defence. Now this, if established, would be a very good ground indeed for this appeal. But it seems to us that in no less than two passages in his charge to the Jury, the learned Judge has drawn the attention of the Jury to this point, and on the second occasion he spoke most specifically. We, of course, do not know how much he may have enlarged upon it, but these are only the heads of charge. He commences by pointing out to the Jury that, if they are "not satisfied that the crop was Raffiuddin's, and find in favour of the accused, then the latter had undoubtedly the right of private defence against the landlord's emissaries, and were justified in interfering and removing the crop themselves. But the right is strictly a limited right, and, if it is exceeded, the benefit of it as a plea is lost." He goes on to say "the *onus* is on the accused to show not only that he was exercising the right, but that he did not exceed it, and the *onus* may be discharged without adducing independent evidence." He, therefore, evidently considered that each man had to establish his case for himself. Later on, after explaining the duties of the Jury and the law on the subject, he says to the Jury "having found the actual facts for yourselves you must proceed in the

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light of these remarks to decide whether the accused exceeded the right in this case. If you find that the right was exceeded, then you should go on to consider the evidence of participation against each one of the accused individually." He then proceeds to summarise the evidence against each of them. The consideration of participation against each, which the learned Judge enjoins upon the Jury, is obviously the consideration upon which they had to decide, if the accused had exceeded the right of private defence, or rather, if the right of private defence had been exceeded by all or any of them. There is, therefore, clear indication in this passage that the Judge did warn the Jury not to place all the accused in the same category in respect of this right. But at the end of his charge he gave them a still more decided warning. In dealing with the case of Ram Sahai he says "you should also consider the question of the right of private defence with reference to the special and separate charge against Ram Sahai. Is he personally protected by that right as explained above? You may find that the rioters generally did not exceed their right, but it does not follow that Ram Sahai did not exceed his, if he acted in the manner alleged against a person armed apparently with at most a small stick." It is perfectly clear from this passage that the Judge drew the necessary distinction between persons, who had used weapons and used them in excess of the right of private defence, and persons about whom it was open to the Jury to find that they had not exceeded that right. It does not, therefore, appear to us that there was a misdirection. But we think it is perfectly clear that the Jury were moved to convict the persons they did by the fact that these were the only men, who were mentioned in the dying declaration of the deceased, and in connection with a ruling of this Court, which has been cited to us by the learned Counsel for the appellant, this view of the Jury becomes somewhat important. In *In the matter of Kalee Mundle* (1), a Division Bench of this Court observed: "when individual members of that assembly exceeded their right of private defence, did it become

an unlawful assembly within the definition in section 141 of the Indian Penal Code? Such a conclusion could be supported, if the Judge had found under section 142 of the Indian Penal Code, that all or some of the ryots, having become aware that the right of private defence had been exceeded by some members of the assembly, continued in it." In that case there was no indication that they did. In this case the Jury evidently were moved by the most patent consideration that these were the men, whom the deceased had seen and identified, when he was lying on the ground mortally wounded, under the order of the first accused, by Ram Sahai. He actually saw these men standing so near to him that he could identify them. This would lead to an inference by the Jury that there was an unlawful assembly, and that these men continued in the assembly, and aided and abetted the persons, who exceeded the right of private defence. As a matter of law we are inclined to hold that Baijnath, who gave the orders upon which Ram Sahai used a sword, would not be protected by any right of private defence, and it must be held that he exceeded that right. There is also another of the appellants, Ganouri Dhanuk, against whom there was evidence before the Jury that he used a *lobanda* (iron-shod *lathi*) upon the hand of one of the persons present. For these reasons we think that there was no misdirection, and that, even if the Jury thought that the remainder of the accused had the right of private defence, they were fully justified in finding that these seven men had not that right, or continued in the unlawful assembly after they knew that the right of private defence had been exceeded. We may mention that the number of persons acquitted by the Jury, possibly on the ground that they were acting in the exercise of the right of private defence, was 28 out of 36 charged before them. It is, therefore, clear that the Jury must have had special grounds for bringing in the verdict they did against these seven persons, and we cannot assign any other ground than that we have just now indicated.

The appeal will be dismissed, and the accused will serve out the rest of their sentences.

Appeal dismissed.

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CRIMINAL REFERENCE.

Before Mr. Justice Holmwood and Mr. Justice Ryves.

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Death by rash or negligent act—Criminal rashness or negligence—Firing at object on the sky-line of an eminence near a public road without proper precautions against danger—Indian Penal Code (Act XLV of 1860), ss. 304A, 336, 337 and 338—Compensation to relative for death by rash or negligent act—Criminal Procedure Code (Act V of 1898), s. 545.

Two persons, one a corporal and the other a private, who had both been in the regiment over four years, went to a plantation at the edge of which there was an eminence on which they set up at the sky-line a small tin case as a target, and fired several shots at it, from a distance of 100 feet, with a quarter inch bore saloon rifle sighted to 100 yards. There was a public road used by the villagers about 150 yards away, and 60 feet below the level of the eminence, but in the direct line of fire.

The road was not visible from the firing point, but clearly so from the target. A bullet struck a man passing along the road at a spot in the line of fire, though it did not appear, who had fired the shot. No precautions of any kind were taken to prevent danger to passers-by on the road from such firing.

Held, that they were both guilty of criminal rashness and negligence within section 304A read by itself without reference to ss. 34 and 107, in firing at an object on the sky-line of the eminence, against the light, (which was in itself dangerous), near a public road within the zone of fire with a rifle which, sighted to a 100 yards, they must have known might easily carry some considerable distance beyond and prove fatal, without taking any precautions or using the slightest circumspection with reference to the safety of others.

The words "rash or negligent act" in section 304A of the Penal Code have the same meaning as "does any act so rashly or negligently" in sections 336, 337 and 338. Section 336 renders criminal the doing of any act so rashly or negligently as to endanger human life or the safety of others, irrespective of the consequences. Sections 337 and 338 only impose a greater punishment when hurt or grievous hurt is the result of such rashness or negligence. Section 304A provides for the case of death by such rash or negligent act under circumstances not amounting to culpable homicide.

* Criminal Reference No. 40 of 1908, by F. S. Hamilton, Sessions Judge of Darjeeling, dated the 16th November 1908.

Reg. v. Salmon (1) and *Reg. v. Nidamarti Nagabhushanam* (2).

Section 545 (1) (b) provides for compensation, in cases where it is recoverable under Act XIII of 1855, to the persons therein indicated, viz., "the wife, husband, parent and child, if any" of the deceased.

Yalla Gangulu v. Mamidi Dali (3) dissented from.

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THE accused, Corporal Morgan and Private Lawson of the Highland Light Infantry, were tried under sections $\frac{304}{114}$ of the Penal Code before the Sessions Judge of Darjeeling with a Jury, who found that they, or one of them, caused the death of the deceased, that they were careless but not criminally so, and that they were, therefore, not negligent within the meaning of the section. The Sessions Judge refused to accept the verdict, and referred the case to the High Court under section 307 of the Criminal Procedure Code.

On the morning of the 25th October last the accused went out for shooting practice with a quarter-inch bore saloon rifle sighted to 100 yards. They went down the Old Calcutta Road and up the hill-side to a plantation, where they found a tin case about six inches by four, which they set up as a target at a spot (marked *c* on the plan) on the sky-line on a small eminence at the edge of the plantation, and fired several shots at it from a point (marked *b*), a distance of 100 feet, and against the light. The Old Calcutta Road, a bend of which comes directly in the line of fire from *b* to *c*, was not visible from the firing point, but clearly so from *c*, to which the accused admittedly went in order to fix up the tin case. The distance of the road from this place is about 150 yards beyond, and lower by about 60 feet than the level of the eminence. The road was not usually much frequented, but it was a public way used daily by the villagers of Aloobari. A bullet struck the deceased, who was passing along the road, at a point *d*, which was in the direct firing line between *b* and *c*. It was not found, who fired the fatal shot, but the bullet extracted from the body of the deceased fitted the cartridges used by the two accused.

(1) [1880] L. R. 6 Q. B. D. 79.

(2) (1872) 7 Mad. H. C. 119, 120.

(3) (1897) I. L. R. 21 Mad. 74.

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Mr. Stokes (with him *Babu Lalit Mohan Banerjee*) for the accused. The verdict of the Jury is plain. They found that the accused were negligent, but not criminally so. They are entitled to find the degree of negligence there was in the case as a question of fact. The verdict is not perverse, and should not be interfered with.

The Deputy Legal Remembrancer (Mr. Orr) for the Crown. The evidence shows that the accused were guilty of negligence within the meaning of section 304A, and, even if not, the offence under section 336 has been made out.

HOLMWOOD AND RYVES JJ. Corporal Morgan and Private Lawson of the Highland Light Infantry were placed on their trial before the Sessions Judge of Darjeeling and a Jury on the 16th of November 1908. The charge against them, as amended in the Court of Session, was framed under section 304A read with section 114 of the Indian Penal Code, and ran as follows :—"That you, on or about the 25th day of October 1908, at Aloobari Busti, each abetted the other in the causing of death by a rash or negligent act, each being present when the act, which resulted in death, was committed, and the act abetted being committed in consequence of the abetment, and thereby committed an offence punishable under sections 304A of the Indian Penal Code." We will refer later on to the wording of this charge. The accused pleaded not guilty to the charge and, at the conclusion of the trial, the Jury returned the following verdict : "We find that the accused, or one of them, caused the deceased's death. We find that they were careless, but not criminally so, and that, therefore, they were not negligent within the meaning of the section. We, therefore, find them not guilty of the offence charged." The learned Sessions Judge, however, refused to accept this verdict, and has referred the case to us under the provisions of section 307 of the Code of Criminal Procedure.

The facts of the case are very simple and are admitted. Indeed, almost the entire evidence, which connects the accused

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with the death of the unfortunate man Kachar Singh, is to be found in the frank statements which the accused made before the committing Magistrate and to which they have all along adhered. It appears from these statements, which we accept, that on the morning in question the two accused, who belong to a regiment that has been stationed for some time at Jalapahar, went out to practise target shooting. They took with them a "small rifle." This rifle is not before us, but it was before the learned Sessions Judge and the Jury, and has been described as having a small bore, one-fourth inch in diameter, and was sighted for 100 yards. They proceeded down what is known as the Old Calcutta Road and along it to the Bhutia graves, and then climbed up the side of the hill to the cryptomeria plantation. Here they found a small empty tin which they used as a mark. They first stood at a point marked *f* on the plan, and fired a few shots at the tin, which was placed at a point marked *c*. They then went from *f* to a point marked *b*, and placed the tin at a point marked *a*. So far their shooting was perfectly safe. Next, they placed the tin again at *c* on a small eminence on the sky-line, and fired at it from *b*, a distance of 100 feet, against the light. It appears from the evidence that a person standing at *b* and firing at *c*, which was on the sky-line, could not see the Old Calcutta Road, a bend of which comes directly into the line of fire from *b* to *c*, some 640 feet, according to the map, beyond the point *c*, but some 60 feet lower. This measurement, however, is entirely fallacious, as it was made by passing a tape over the very uneven surface of the intervening ground. The actual distance that the bullet would have to travel between the points *c* and *d* does not seem to be more than about 150 yards. For the first 120 yards or so, probably its flight was fairly horizontal; after that the bullet, which had lost much of its velocity would probably have dropped very quickly. It is proved, however, that a person, standing at *c* could plainly see the road. In their statements the accused say they both went to the point *c* to place the tin. They must, therefore, if they had used the least circumspection, have noticed this road. It is true that the road is not one that

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is usually much used, but the fact remains that it is a public road and is used daily by the inhabitants of the village of Alooabari. After firing a few shots the accused went home, unconscious that any one had been injured. A man named Kachar Singh, however, who was walking along the road at the point *d* was struck by a falling bullet, which entered the chest and perforated the stomach and wounded the left kidney. Kachar Singh was seen to fall by another way-farer, and was helped to Alooabari Busti and afterwards to the hospital at Jalapahar, where he died some six days later from peritonitis. After a *post mortem* examination the bullet was found in the body of the deceased, and this fitted the cartridges used by the accused. There can, therefore, be no possible doubt that the death of Kachar Singh was caused by this bullet, which had been fired by one or other of the accused. It is impossible to say who fired it. Under these circumstances we have to consider what offence, if any, was committed by either or both of the accused. There would seem to be no doubt that, on similar facts, in England both the accused might be convicted of manslaughter. The case of *Reg. v. Salmon* (1) is similar. There three persons took an army rifle and some ball cartridges into a field, and having fixed a board in a tree 8 feet from the ground, began firing at it from a distance of 100 yards. The second shot that was fired happened to kill a boy, who had climbed up a tree distant about 400 yards away. The Jury convicted all the prisoners of manslaughter, and Coleridge C. J. stated a case for the Court of Crown Cases Reserved "whether there was any evidence upon which any one or all of the prisoners could be convicted of manslaughter." The Court consisting of Coleridge C. J., Field, Lopes, Stephen and Williams JJ. held that the conviction must be affirmed. "If," said Lord Coleridge, "a person will, without taking proper precautions, do an act which is in itself dangerous, even though not an unlawful act in itself, and if in the course of it he kills another person, he does a criminal act, which in law constitutes manslaughter. It was manslaughter

(1) (1830) L. R. 6 Q. B. D. 79.

in him who killed the boy. The death resulted from the action of the three and they are all liable."

The learned Sessions Judge, from the way in which he framed the charge, apparently was of opinion that, on the wording of section 304A of the Indian Penal Code, the only person, who could be punished under that section, was the person, who actually fired the shot, which resulted in death. In his charge to the Jury, he said : "It cannot be known which of the accused committed the act charged, that is which of them fired the shot, which caused the death. But if you are satisfied that one of them fired the shot, you will probably find that the other abetted such firing." He goes on to say that sections 34 and 114 of the Indian Penal Code were then explained to the Jury.

The words "any rash or negligent act not amounting to culpable homicide," which occur in section 304A, were considered and explained by Holloway J. in *Reg. v. Nidamarti Nagabhushanam* (1) in the following terms : "Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they may not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness. Culpable negligence is acting without the consciousness that the illegal or mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that, if he had, he would have had the consciousness. The imputability arises from the neglect of the civil duty of circumspection." It seems to us that the words "rash or negligent act," as used in section 304A, must have the same meaning as the words "does any act so rashly or negligently" which are to be found in sections 336, 337 and 338 of the Indian Penal Code, although the phraseology is slightly different. We do not think section 304A of the Indian Penal Code creates any new offence. The object of the Legislature in passing section 336 was to render criminal the doing of any act so rashly or negligently as to endanger

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(1) (1872) 7 Mad. H. C. 119, 120.

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human life or the safety of others. The mere doing of an act so "rashly or negligently," quite irrespective of the consequences, was made an offence. Now, on the facts of this case, adopting the definition of "criminal negligence" given above, we are clearly of opinion that both the present accused could have been convicted under section 336 because they fired with the rifle from the spot *b*, at a mark which they had placed on the sky-line at *c*, without having taken any precaution or used the slightest circumspection with regard to the safety of others. Section 337 only enables a Court to impose greater punishment when hurt is the result of such criminal rashness or negligence. Similarly section 338 provides for a still further enhanced punishment when, under similar circumstances, grievous hurt is the result. The original Code made no provision for the case of death being caused by such a rash or negligent act. We think section 304A does nothing more than supply the omission by rendering a person or persons, who caused the death of another by a rash or negligent act, under circumstances not amounting to culpable homicide, liable to punishment up to two years' imprisonment, or with a fine or with both. We think, therefore, that both the accused can legally be convicted and punished under section 304A of the Indian Penal Code because the death of Kachar Singh was directly due to what we hold to be a criminally negligent act on the part of both of the accused within the meaning of section 304A. We, therefore, think that the law in India is in accord with what was laid down in *Reg. v. Salmon* (1), and that it is unnecessary to call in aid sections 34 or 107, even assuming that either of these sections could possibly apply when the facts showed that at the most the accused were guilty of "negligence" only. It is difficult to see how a person can "abet" the "negligence" of another without himself being equally "negligent" within the meaning of the section, having regard to the definition of "negligence" above quoted. It seems to us that these two soldiers, one of whom is a Corporal, and both of whom have been in the army for over four years and, therefore, must be familiar with the

(1) (1880) L. R. 6 Q. B. D. 79.

use of fire-arms, were bound to use all reasonable precautions to prevent their firing from endangering human life. Although the rifle they were using was not a very dangerous weapon, they must have known that, as it was sighted up to 100 yards at least, it might easily prove fatal for some considerable distance beyond that limit, and the fact that they fired at an object on the sky-line on the hill side and against the light was, as they probably would have themselves admitted, if they had stopped to think for a moment, in itself dangerous. Further when they stood at the point *c* to fix their mark, they should have looked round and satisfied themselves that there was no danger in firing in the direction from *b* to *c*. If they had used the least circumspection, they would have seen that the bend of the public road was in the direct line of fire, a little below them and not more than about 150 yards distant.

For the above reasons we convict both the accused under section 304A of the Indian Penal Code.

We do not, however, think that a severe sentence is called for in this case. We think the ends of justice would be met by imposing a fine. We direct that they be fined Rupees fifty each or, in default, suffer rigorous imprisonment for a period of three weeks. We further direct that the fines, if paid, be handed over to the widow of the deceased or such other person, whom the District Magistrate on enquiry may find entitled to it, under the provisions of section 545 of the Criminal Procedure Code.

We are aware that a Full Bench of the Madras High Court, in the case of *Yalla Gangulu v. Mamidi Dali* (1) has held that compensation cannot be given to the widow of a deceased person in a case like this. But, apart from the rulings of the Madras High Court, we know of no ruling which has taken the same view of section 545 as it stands in the present Code, and we prefer to follow the opinion of Benson J. to the contrary in his order of reference to the Full Bench for the reasons which he has given. There are two cases of this Court which interpreted the law in the same way as the Full Bench of the Madras

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High Court, but the words of the Code which they had to consider were, as pointed out by Benson J. in his order of reference, entirely different from the words which are now to be found in section 545 of Act V of 1898. We think that clause (b) of section 545 has been expressly framed so as to provide for compensation being given in cases where it is recoverable under Act XIII of 1855, and to the persons indicated in that Act, namely, the "wife, husband, parent and child, if any" of the deceased.

E. H. M.

Appeal allowed.

PRIVY COUNCIL.

SHAM SHIVENDAR SAHI

v.

JANKI KOER.*

P. C.*

1908

Oct. 29, 30.
December 15.

[On appeal from the High Court at Fort William in Bengal.]

Title—Gift—Evidence of title—Gift made orally by proprietor of Betia Raj to his daughter at her marriage—Condition attached to gift—Subsequent deed with recitals confirming gift—Suit by successor in title of donor against husband of donee for possession of subject of gift—Donee's power of alienation to prevent gift devolving on husband.

The question in this case was whether the appellant or the respondent was entitled by inheritance to a village the subject of a gift said to have been orally made by a predecessor in title of the respondent to his daughter on her marriage to the appellant in 1868, for possession of which the respondent sued.

Her case was that the gift was subject to the condition that on the death of the donee without issue (which event had occurred) the village should revert to the donor and his heirs: and she relied on an *ekrarnama* executed by the donor in 1883, when the donee was separated from the appellant and was an inmate of her father's house, by which deed the alleged condition of the gift was recited and confirmed.

The defence set up by the appellant was that the village had been given to him at the marriage for the benefit of himself and his wife, or, in the alternative, that, if it was given to his wife, he took it as her heir. The Subordinate Judge found on the evidence that the appellant and respondent both failed to prove any condition attached to the gift, but that, inasmuch as it was common ground that there was a gift to the daughter, it must be presumed to have been an absolute gift, and the appellant was entitled as her heir.

Held, by the Judicial Committee, that the High Court was right in reversing that decision, because, if the gift of the village were absolute in favour of the daughter, she had, on the evidence in the case, by the subsequent deed of 1883, agreed it should at her death revert to her father and his heirs.

APPEAL from a judgment and decree (10th July 1905) of the High Court at Calcutta, which reversed a judgment and decree (14th April 1902) of the Subordinate Judge of Sarun.

The defendant was the appellant to His Majesty in Council.

* *Present* :—Lord Macnaghten, Lord Atkinson, Sir Andrew Scoble, and Sir Arthur Wilson.

1914
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...ed that subsequent to the gift
...not entered in the Collector's re-
...ent revenue and village cesses were
...ata by the Maharaja: though from
...until his death in 1880, Sridhar Sahi,
...seems to have received the rents and
...half of his son.

Maharaja Sir Harendra Kishore Singh
Raj, in pursuance of a step which had
father's life-time, an application was
y 1884 that the name of the donee
be recorded in the Collector's regis-
entry therein of the lady's name were
The claim for such registration was
...ed of 15th June 1883.

he appellant's name was entered in the
ehalf of his wife in regard to one half
, and on 31st March 1896 in regard to

...o since 1875 had separated from her
...ith her father, died on 6th August 1896
...and on 29th October 1896, application
...ame of Maharani Janki Koer, who had
Raj, entered on the Collector's register
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...ch the present appeal arose.

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The principal question for decision in this appeal was the nature of the interest granted by the late Maharaja Rajendra Kishore Singh of Betia to his daughter Ratnabati Koer in the village of Samahuta.

The Betia Raj was an impartible estate. In 1867 the owner was Maharaja Rajendra Kishore Singh. On 28th July of that year, he executed a deed by which he appointed a committee for the management of his estates and undertook, among other things, not to alienate any portion of them. He died on 28th December 1883 and was succeeded by his son Maharaja Sir Harendra Kishore Singh, who died on 26th March 1893 and was succeeded by his senior widow Maharani Sheo Ratan Koer, on whose death on 24th March 1896 Maharani Janki Koer, the respondent, as junior widow became entitled to the estate.

On 15th June 1883, Maharaja Rajendra Kishore Singh executed the following document in favour of his daughter Babui Ratnabati Koer :—

“Mouzah Samahuta, Pergunnah Bal, District Sarun, was without the execution of any deed conveyed by gift in khoincha to my daughter Babui Ratnabati Koer on the occasion of her marriage, and no deed has up to this day been executed in respect thereof in favor of the said Babui Saheba. I have been paying the Government Revenue and road cess, etc., and my name still stands recorded in the Collectorate. It is now necessary that a deed in respect thereof should be executed in favor of the said Babui Saheba and her name registered in the Collectorate. Therefore I convey by gift in khoincha hereunder the said mouzah, *i.e.*, mouzah Samahuta, Pergunnah Bal, the value of which is Rs. 100,000 to Babui Ratnabati Koer (may she live long) with the same conditions as before. It is provided that the said Babui Saheba shall, without having the power of making transfer, hold possession of the said mouzah and enjoy the proceeds thereof during her lifetime. After the death of the said Babui Saheba any child born of the womb of Babui Saheba will hold possession of the same. In the event of her dying without any child born of her womb, the said mouzah will again revert to me and after me it will pass to my heirs as proprietors thereof. The said Babui Saheba shall get her name registered in the Collectorate on expunction of my name and pay the Government Revenue and public demands; I neither have nor shall have any objection to it.”

The oral gift therein referred to was made in January 1868 on the occasion of the marriage of Ratnabati Koer to Sham Shivendar Sahi, the present appellant, and it appeared from

the recitals in the above deed that subsequent to the gift the name of the donee was not entered in the Collector's registers, whilst the Government revenue and village cesses were paid in respect of Samahuta by the Maharaja: though from the time of the marriage until his death in 1880, Sridhar Sahi, the father of the appellant, seems to have received the rents and profits of Samahuta on behalf of his son.

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On the succession of Maharaja Sir Harendra Kishore Singh in December 1883 to the Raj, in pursuance of a step which had been contemplated in his father's life-time, an application was made on 13th February 1884 that the name of the donee Ratnabati Koer should be recorded in the Collector's registers, and orders for the entry therein of the lady's name were made on 21st June 1884. The claim for such registration was expressly based on the deed of 15th June 1883.

On 29th August 1890, the appellant's name was entered in the register as manager on behalf of his wife in regard to one half the village of Samahuta, and on 31st March 1896 in regard to the other half.

Ratnabati Koer, who since 1875 had separated from her husband and had lived with her father, died on 6th August 1896 without leaving issue; and on 29th October 1896, application was made to have the name of Maharani Janki Koer, who had then succeeded to the Raj, entered on the Collector's register in place of that of Ratnabati Koer, on the ground that under the conditions on which the village of Samahuta was held it reverted to the Betia Raj on the death of Ratnabati Koer without issue.

An application for the registration of his own name was made on 4th February 1897 by the appellant, who based his claim on his possession.

Both these applications were disposed of on 17th October 1898 by an order of the Deputy Collector, who directed the entry of the appellant's name on the register, in consequence of which Maharani Janki Koer on 13th February 1900 instituted the suit out of which the present appeal arose.

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The plaintiff recited the gift by Maharaja Rajendra Kishore Singh to Ratnabati and the conditions on which it was made, stated that in accordance with those conditions the village of Samahuta reverted to the Betia Raj, and prayed for possession thereof with mesne profits.

The defendant in his written statement asserted that at the time of his marriage the village of Samahuta was gifted to him personally for the benefit of himself and his wife and not to his wife; and, in the alternative, that if the gift was made to his wife it was made free of the limitations and conditions sought to be attached to it, and conveyed to her an absolute estate in the village, which on her death vested in him as her heir.

The Subordinate Judge was not satisfied with the oral evidence adduced on behalf of the plaintiff, remarking that it was incredible and repugnant to Hindu feeling that on the auspicious occasion of the marriage of Ratnabati the gift should have been made expressly defeasible on her death without issue, and he held that the ceremony at which, according to the plaintiff's case, the gift was made "only takes place when the bride for the first time goes to her husband's house, on which occasion farewell gifts are made in *khoimcha* (extremity of the cloth worn by the girl) which is untied in the girl's husband's house." and remarked that Ratnabati having been married in childhood went to her husband's house for the first time four years after her marriage, while "according to the case of either party the defendant's father, and after his death the defendant, have been in possession of Samahuta and enjoyed the profits since the date of the gift in 1868." With regard to the *ekrarnama*, dated 15th June 1883 on which the plaintiff relied, the Subordinate Judge, after observing that Ratnabati had no independent advice in the matter, expressed his opinion that "the young Rajah must have induced his father to execute the deed with a view to get the village back to the family, there being at that time bad blood between him and the defendant. Under these circumstances, Ratnabati herself would not have been bound by her acceptance of the *ekrarnama* and it was not binding on the defendant." He then proceeded to deal with

the documents relating to the various proceedings under the Land Registration Act (Bengal Act VII of 1876) and the Land Acquisition Act (X of 1870) and so far as the plaintiff's case was concerned he concluded as follows :—

“ From the observations made above upon the oral and documentary proof of the plaintiff, I find she has failed to prove affirmatively her case as alleged in the plaint, viz., that mahal Samahuta was given to Babui Ratnabati in *dan khoircha* for her life and that after her death it would devolve upon her issue and that on her dying childless it would revert to the Betia Raj.”

As to the defendant's case the Subordinate Judge held that on the oral evidence “ his title to Samahuta in *dahez* was not established.” After considering the documentary evidence he expressed the opinion that it did not improve his case, and as to the cases of both parties he concluded his judgment as follows :—

“ The result of the consideration of the evidence in this case is that the plaintiff has failed to establish the case as alleged by her and that the defendant has also not been able to make out the case of absolute gift of Samahuta in *dahez* to him. It is admitted on behalf of the plaintiff that village Samahuta was given under a verbal gift to the defendant's wife, Babui Ratnabati Koer, on the occasion of her marriage. She alleges, however, that the gift was a qualified one, being defeasible on Babui dying childless. This limitation or condition is not proved. Hence under the law the gift must be considered to have been made absolutely to the Babui, and on her death the defendant as her husband and heir is entitled to succeed to village Samahuta in which his possession has been undisturbed all through and as such it must be maintained. The plaintiff's suit must accordingly be dismissed.”

On appeal by the plaintiff the High Court (Henderson and Geidt JJ.), whilst expressing their opinion that little reliance could be placed on the oral evidence on either side with regard to the terms on which the gift was made, held with reference to the *ekrarnama* of 15th June 1883, and the proceedings under the Land Acquisition Act, and Bengal Act VII of 1876, and having regard to the circumstances under which the gift was made and to the conduct of the parties subsequent to the gift, that the plaintiff had established that the gift was made subject to the condition alleged in the plaint. The High Court therefore reversed the decision of the Subordinate Judge and made a decree giving the plaintiff possession of Samahuta with mesne profits.

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Sir R. Finlay, K.C., and *Kenworthy Brown*, for the appellant, contended on the evidence that the High Court was wrong in holding that the respondent had proved that the gift was made subject to the condition alleged by the respondent. For the reasons given by the Subordinate Judge it was submitted that the High Court ought to have found that the appellant was entitled to the village sued for either in his own right or as heir to Ratnabati Koer. The village, the subject of the gift, was of considerable value, and it was very improbable that the condition, if made, would not have been put on record in writing, and not left, in the case of an estate of such value, to be settled orally. The burden of proof in the matter was on the respondent and she had not discharged it. Reference was made to the Land Registration Act (Bengal Act VII of 1876), section 3, clause 6.

DeGruyther, K.C., and *E. U. Eddis*, for the respondent, contended that there were concurrent findings of fact that at the time of his marriage the village in suit was not gifted to the appellant. As held by the High Court the respondent had sufficiently established that the village was given to Ratnabati Koer subject to the condition that, if she died without issue, it should revert to the Betia Raj. As to the probability that the *ekrarnama* of 15th June 1883 stated the true facts of the matter as to the gift, reference was made, among others, to the following passage from the judgment of the High Court. "It must not be lost sight of that at this time the defendant and his wife were on very bad terms, that they had ceased to live as husband and wife, and that there was no longer a possibility of issue of this marriage. On the one hand, this fact might be a very good reason for a deed being executed in order to put on record the actual terms of the gift. On the other hand, as suggested by the defendant, it might be an equally strong reason for the Maharaja endeavouring to prevent the village on the death of his daughter passing into the hands of the defendant and so being absolutely lost to the Raj. But the evidence is that the Maharaja was up to his death on good terms with his son-in-law.

At the same time it must be taken that the Maharaja was aware of the terms of the original gift and he admittedly enjoyed the reputation of being a thoroughly upright and honest man." The reason for the *ekrarnama* being executed was in order to conform to the provisions of the Transfer of Property Act (IV of 1882) as to registration. The right of the parties to the village was now, it was submitted, governed by the terms of that deed, by which provision for reversion to the Raj in default of issue, is expressly made. Reference was made to Mayne's Hindu Law, 7th edition, pages 885, 886 as to the power of a wife to dispose of property without consent of her husband. The conclusion come to by the Subordinate Judge in favour of the defendant was one, which there was no evidence on the record to support.

Sir R. Finlay, K.C., in reply.

The judgment of their Lordships was delivered by—
LORD MACNAGHTEN. This is an appeal from the High Court at Calcutta reversing the decree of the Subordinate Judge of Sarun.

The matter in controversy is the possession of mouza Samahuta. This mouza formed part of an impartible raj known as Betia Raj. In 1868 the owner of the Betia Raj was the Maharaja Rajendra Kishore Singh. In that year his daughter Ratnabati Koer was married to the appellant, Sham Shivendar Sahi. On the occasion of the marriage the Maharaja made a verbal gift of Samahuta. The question is : To whom and on what conditions, if any, was the gift made ?

In the Court of first instance the respondent, Maharani Janki Koer, who had succeeded to the raj, maintained, as she still maintains, that the mouza was given to Ratnabati subject to a condition that, if she should happen to die without issue—as she did—it should revert to the raj. She was plaintiff in the suit. The appellant, who was defendant, asserted that Samahuta was given to him, for the benefit, of course, of his wife and himself. He also set up, argumentatively, an alternative

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case. In his written statement he suggested that, if it should be held that the gift was a gift to his wife—which, he averred, was not true in fact—then it ought to be held that, on the death of his wife without issue, he became the owner as her heir.

The marriage of Ratnabati took place in January 1868. The bride was then seven or eight years old, the bridegroom nine or ten. In April or May 1872 Ratnabati went to her husband's house. She stayed there only a short time, returning to her father in June or July 1872. In November 1873 or 1874 she went back to her husband, but left in November or December 1874 or 1875, declaring that she would rather die than live with him any longer. The rest of her life was spent at Betia, where she resided with the Maharaja.

From the time of the marriage until his death in 1880, Sri-dhar Sahi, the defendant's father, received the rents and profits of Samahuta on behalf of his son.

In 1877, after the Registration Act VII of 1876 came into force, the Maharaja applied that his name, which had remained on the Collectorate books, might be registered in respect of Samahuta. The necessary notifications were issued, and, after some opposition at first on the part of the defendant, the name of the Maharaja was registered, and registered ultimately without objection in July 1879.

On the 15th of June 1883, the Maharaja executed an *ekrar-nama*, which is the most important document in the case. After reciting that Samahuta had been given to his daughter by way of khoincha gift at the time of her marriage, but that no deed had been drawn up, the Maharaja purported to convey Samahuta to Ratnabati by way of khoincha gift "with the same conditions as before," to hold possession and enjoy the income, but without power of alienation, subject, however, to the provision that, in the event of her dying without issue, the property should revert to him and after him to his heirs. It was also provided that Ratnabati should get her name registered in the Collectorate and pay the Government revenue and all public demands.

On this deed being executed, Ratnabati took steps to get her name registered, relying on the deed of the 15th of June 1883 for her title. No objection was raised on behalf of the defendant.

The Maharaja Rajendra Kishore Singh died on the 28th of December 1883, and was succeeded by his son, Sir Harendra Kishore Singh.

Ratnabati's name was duly registered on the 21st of June 1884.

Shortly afterwards the defendant brought a suit against Harendra to recover his wife, but the suit was dismissed.

Between 1884 and 1891 several pieces of land in Samahuta were acquired for the Bengal North-Western Railway. The purchase money, or compensation, was received by the Maharaja, although there seems to have been a claim at first on the part of the defendant.

In 1887 the defendant brought rent suits against tenants of lands in Samahuta, alleging that he was in possession and making collections in his own name. The suits were dismissed on the ground that he was not the registered proprietor, the lands being registered in Ratnabati's name. Then he applied to be registered as manager for his wife. In this application the deed of the 15th of June 1883 was again referred to, and recognized as a document of title.

The Maharaja Harendra died on the 26th of March 1893, leaving two widows, but no issue. On the death of the elder widow the present respondent succeeded to the raj as her husband's heir. Then she claimed to be registered in the place of Harendra. But after a contest before the Deputy Collector, the defendant succeeded in getting mutation of names in his favour.

The ground of claim, which he asserted, was not inheritance from his wife, but "proprietary right, having possession."

The respondent then brought this suit.

The Subordinate Judge gave judgment on the 14th of April 1902. He observed at the outset of his judgment that it would be a difficult task to arrive at a right conclusion in this case.

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He put aside, as unworthy of credit, the oral evidence adduced on the one side and on the other, to prove what was said and done on the occasion of the marriage. He rejected the case put forward on behalf of the defendant, which was that Samahuta was given to him. He thought the defendant himself unworthy of credit. But he also rejected the case of the plaintiff, mainly on the ground that it was impossible to believe that on so auspicious an occasion as marriage the contingency of the death of the bride without issue could have been referred to. "The story of the gift," he says, "is altogether repugnant to a Hindu feeling. It can find no credence with me." And then he held that, as the plaintiff failed in her case and the defendant failed in his, it followed, inasmuch as it was common ground that there was a gift, that it must be taken that the gift was absolute in favour of Ratnabati. And so it was adjudged that the defendant should succeed as heir to his wife.

The learned Judges of the High Court on appeal reversed the judgment of the Subordinate Judge. They agreed with him in thinking that no reliance could be placed on the oral evidence. But they thought that there was no ground for impeaching the *ekrarnama* of the 15th of June 1883, and, after a careful and elaborate review of all the facts and circumstances of the case, they came to the conclusion that the acts and conduct of the defendant were inconsistent with the case which he set up as being the true case, and equally inconsistent with the case on which he was content to rely, although he protested it was not true.

The learned Judges rejected with something like scorn the excuses which the defendant made for his conduct and his affectation of ignorance in regard to what was being done from time to time in his name and on his behalf. This part of his case depended entirely on his own testimony. His character for truth fared no better in the Court of Appeal than in the Court below. The learned Judges describe him as "a man who is utterly reckless as to what he will say, if he thinks it will advance his case."

On the appeal to this Board the learned Counsel for the appellant attacked the judgment of the High Court on the ground that the learned Judges had not addressed themselves to what was then the real issue. They had, it was said, combated with great elaboration a case which had been disposed of in the Court below. They slew the slain over again. But they gave the go-by, or at least paid scant attention, to the grounds on which the Subordinate Judge had decided in favour of the defendant.

Their Lordships think that this criticism is not well founded. If the judgment of the High Court is read carefully, it is quite plain that the defendant must have relied, and relied entirely, on the case which he set up in his written statement. That was, as the learned Judges say, his "real case," although an alternative case was suggested. This is clear from the judgment, which does not even notice the main, if not the only, ground of the judgment of the Subordinate Judge. But it is made still plainer by the course which the defendant adopted. He was not altogether satisfied with the judgment he had obtained in his favour. He filed a memorandum of cross-objection to the plaintiff's petition of appeal. He preferred his petition, he said, "being dissatisfied with a portion of the decision of the Subordinate Judge." The main ground of his cross-objection was that the Court below was—

"wrong in rejecting the case set up by the petitioner and disbelieving the evidence adduced by him in support thereof. The said Court should have held upon the evidence on the record that Samahuta was given to him absolutely for the benefit of himself and his wife at the time of the departure of the barat as alleged by him."

Probably the defendant was well advised in taking this course. There is not a shred of evidence in support of the view which determined the Subordinate Judge in favour of the defendant. With all respect to the learned Judge, whether he was right or wrong in his view, it would have been out of the question to ask the Court of Appeal to rely on a statement unsupported by evidence at a time when there was no opportunity for contradiction or cross-examination. It certainly would seem that the defendant himself did not place much

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reliance on the view which commended itself to the Subordinate Judge, for it was the very ground on which the Assistant Collector had decided the application for mutation of names, and yet the advisers of the defendant did not think it worth while to produce, or at any rate they abstained from producing, any evidence in support of it.

Without going over the grounds which the learned Judges of the High Court have so fully discussed, it is enough for their Lordships to say that they think that the order under appeal is perfectly right.

The *ekrarnama* of the 15th of June 1883, if not a fraudulent document, is decisive of the case. The character of the old Maharaja for honour and probity stood so high that no one ventured to suggest that there could have been any fraud on his part. It was said that probably, or possibly, he signed the document without knowing what it contained, and that the real author of the scheme to defraud the defendant was Harendra. But there is not the slightest evidence of any fraudulent scheme at all. There was no reason for concocting a fraud. Assuming Ratnabati to have been the absolute owner, it is not disputed that it would have been competent for her to make a disposition of the property, which would have defeated the expectations of her husband. Considering the state of feeling that existed between herself and her husband, it probably would not have required much persuasion to induce her to put the property beyond his reach.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be dismissed.

The appellants will pay the cost of the appeal.

Appeal dismissed.

Solicitors for the appellants : *T. L. Wilson & Co.*

Solicitors for the respondents : *Sanderson, Adkin, Lee & Eddis.*

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[On Appeal from the Chief Court of Lower Burma.]

Sale—Decree—Execution of decree—Sale by Court under decree on a mortgage—Misrepresentation by auctioneer an officer of Court—Contract Act (IX of 1872), ss. 18 and 19, exception—Bid made under misapprehension caused by such misrepresentation—Suit to set aside sale—Purchaser of worthless equity of redemption—Reference of the matter to the Court—Civil Procedure Code (Act XIV of 1882), s. 306.

A sale of mortgaged property in execution of a decree was conducted by two officers of the Court, one a chief clerk and officiating bailiff and the other his deputy, the assistant bailiff, who acted as auctioneer. The latter read a proclamation of sale in English, a language not understood by the native bidders present, which stated that only the interest of the judgment debtor was for sale.

Being asked by a native present to explain the terms of the proclamation, the auctioneer made a statement in Hindustani to the effect that "there are four mortgages; on this account there is a sale by order of the Court, the title-deeds can be seen at the Registrars' Office," from which the plaintiff, who casually attended the sale, was led to believe that the property was being sold at the instance of the mortgagees and free of incumbrances, and he bid for the property, which was knocked down to him for a sum nearly equal to its full value.

After the sale he discovered that it had been sold subject to mortgages amounting to more than its value, and that he was the purchaser of the equity of redemption, which was worthless. In a suit to set aside the sale on the ground that he bid for the property under a misapprehension caused by the misrepresentation made by the auctioneer, the Appellate Court in India held that there was misrepresentation under section 18 of the Contract Act (IX of 1872), but that the case fell within the exception in section 19, as the plaintiff might with ordinary diligence have discovered the truth, and dismissed the suit.

Held, by the Judicial Committee, that in sales under the direction of the Court it was incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers. Here the plaintiff had been misled by the accredited agents of the Court, which could not under such circumstances enforce against him so illusory and unconscientious a bargain as the sale to the plaintiff was shown to be.

* *Present*:—Lord Macnaghten, Lord Atkinson, Sir Andrew Scoble, and Sir Arthur Wilson.

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Held also that the plaintiff had no means of discovering the truth, while the sale was going on, and he was perfectly justified in relying on the statement, as to the property, which was being sold, made by the auctioneer. The exception in section 19 of the Contract Act had no application to the case.

Held further that the Chief Clerk was right in referring the matter to the Court, and in not proceeding under section 306 of the Civil Procedure Code.

APPEAL from a judgment and decree (February 13th, 1907) of the Chief Court of Lower Burma on its Appellate Side, which affirmed a judgment and decree (June 12th, 1906) of the Judge of the same Court on its Original Side.

The plaintiff was the appellant to His Majesty in Council.

Mahomed Kala Mea, the plaintiff, was the highest bidder at an auction-sale of certain property in Rangoon, which took place on 2nd May 1905 under a decree of the Chief Court of Lower Burma obtained by the first respondents, the members of the firm of Harperink Smith and Company against one Kani Choay, the second respondent: and the suit was brought on the 16th May 1905 to set aside the sale, on the ground that the plaintiff had purchased the property under a *bona fide* misapprehension of fact.

The plaintiff in his plaint, after stating that the property was subject to charges amounting to Rs. 64,500 with interest, and that at the auction-sale he bid for it and it was knocked down to him for Rs. 38,000, alleged in paragraph 4 that "before the bidding commenced one Hadji Shah Mahomed Ali said that he did not understand the proclamation, which had been read in English, and asked the bailiff what was being sold. The deputy bailiff Mr. Innes thereupon said in Hindustani 'Char mortgage hai; is waste Court ka hukum se bikri hota. Title deeds Registrarka office men dekne sakta.'" He also alleged that he bid for the property under the *bona fide* belief that it was being sold free of the mortgages upon it; that as it was not worth in any case more than Rs. 40,000 he would not have bid anything if he had known that it remained liable to the mortgages; and that under all the circumstances he was desirous of having the sale set aside on the ground of his *bona fide* mistake, a course to which Harperink Smith and Company consented

and he had added them merely as *pro forma* defendants. The plaintiff prayed that the sale might be set aside ; that all proceedings for the recovery of the amount bid by him might be stayed ; and that Kani Choay, the second defendant, might be ordered to pay the costs of the suit.

The first defendants put in no written statement in answer to the suit. In his written statement the second defendant admitted that the property the subject of the sale belonged to him, but had been attached by the first defendants ; that it was subject to the charges stated in the plaint ; and that it had been knocked down to the plaintiff for Rs. 38,000. But he put the plaintiff to strict proof of the allegations contained in paragraph 4 of the plaint, and also as to the statement that the plaintiff bid for the property under a *bona fide* mistake. He alleged that the property was worth much more than Rs. 40,000, and submitted that the allegations and circumstances relied on in the plaint afforded no ground for setting aside the sale.

The only issue was "are the allegations in paragraph 4 of the plaint correct ; and if so, do they afford any grounds for setting aside the sale ?"

The plaintiff's evidence was to the effect that he was driving past the place, where the property was to be sold, when a Court messenger told him that a sale was about to take place ; he accordingly alighted and attended the sale without having seen the proclamation or being cognisant of its terms. Mr. Innes, the deputy bailiff of the Court, acted as auctioneer and at the opening of the proceedings read the proclamation in English, a language unknown to the plaintiff. Upon this being read, Hadji Shah Mahomed Ali said he did not understand it and would like to know the meaning of its contents, whereupon Mr. Innes made a statement in Hindustani as above-mentioned, which the Court interpreter translated : "There are four mortgages : therefore the sale takes place by order of the Court. The title deeds can be seen at the Registrar's Office." From this statement the plaintiff said he understood that the property was mortgaged, but that it

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was being sold free of the mortgages, as they would be paid from the purchase-money, and in this belief he made a final bid of Rs. 38,000 at which price the property was knocked down to him. Immediately after the sale he learned that the property had been offered subject to four mortgages upon it. Thereupon he refused to pay a deposit or any part of the purchase money, and took proceedings to get the sale set aside.

The plaintiff's evidence was corroborated by Mr. Wesha (one of the four mortgagees) as to the reading of the proclamation and the words in Hindustani spoken by Mr. Innes. He stated that he understood the words to mean that the property was mortgaged and had to be realized under the order of the Court, and he further understood that the proceeds of the sale would go to pay the mortgages upon the property. Two other witnesses, Ebrahim Byameah and Issac Sofaer, gave the same account of what occurred and said that the Hindustani words conveyed the same impression to their minds. The latter said that he had bought and sold a good deal of land and owned property near to that which was the subject of the sale; that he valued the land sold at Rs. 40,000 or Rs. 45,000 at most and that he bid up to Rs. 37,000 for it. But, if he had known that, if he bought the property, he would have had to pay Rs. 64,000 to the mortgagees he would not have bid. Mr. Spencer, an official of the Court, who was acting as bailiff at the time of the sale, was another witness for the plaintiff, but was less certain than the others as to what was said, and his evidence was described by the Court of first instance as "vacillating." What he said sufficiently appears from the judgment of Mr. Justice Irwin on appeal. Mr. Innes' evidence was not taken as he was ill at the time the case was heard:—

The Judge, who tried the case (Begge J.), said:—

"The plaintiff soon after the sale informed the officiating bailiff, according to the report made on the day of sale, that he was not aware that the words '*subject to the mortgage*' meant that he was responsible for the aggregate amount of the mortgages as well as for the amount of his bid; and the officiating bailiff, instead of proceeding under section 306 of the Civil Procedure Code, put in his report I have referred to, in which he said that, as the bidders' statements

that they 'were bidding under a misapprehension appears to be perfectly genuine,' he thought it was his duty to refer to the Court for orders whether, under the circumstances, the sale should be set aside, and the property put up for sale again. Of course the Court could not give any such 'orders'."

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And he was of opinion that—

"Even if the words spoken by Mr. Innes were used, an intimation that the property was to be sold free of mortgages cannot by any process of interpretation be found in them directly, or inferred from them indirectly."

After commenting on the evidence of the plaintiff's witnesses, the Judge said :—

"I give Mr. Spencer credit for trying to give straightforward evidence, and acquit him of all intention of trying to deceive me ; but it is obvious that such confused and incoherent testimony is perfectly useless. Hadji Shah Mahomed Ali has not been called : and I have nothing to say against the discretion of plaintiff's counsel in that respect. But the absence of Innes' evidence is a serious omission as regards the proof of the Hindustani words said to have been used by him, though, as I have said, even if they were proved to demonstration, they would not prove, or even suggest, that the plaintiff had been induced to bid under the belief that the property was to be sold free of the mortgages, or, in other words, that he had been induced to buy by misrepresentation. Innes was summoned as a witness, and I was told late in the hearing on the 7th of June that he was ill ; but, of course, it was then out of the question to grant any postponement. It has not been proved that he did, in fact, use the words relied on, and if he had—as I have said—they could not have raised the impression under which the plaintiff wishes me to believe he bid, and ultimately became the purchaser. Consequently there is no proof, or indeed suggestion, that his conduct caused, however innocently, the plaintiff to make a mistake as to the substance of the thing, which is the subject of the agreement.

"The plaintiff has made out no case for relief under section 35 of the Specific Relief Act, as the contract of sale is not voidable or terminable by him. As for section 36 of the same Act, I do not think there was any mistake at all. The terms, under which the property was sold, were clearly set out in the proclamation, which was made in the language of the Court as required by section 287 of the Code of Civil Procedure, and which had been previously advertised ; and, if the plaintiff did not take the trouble to ascertain clearly under what terms he was bidding, that was his fault and no one else's, and he must take the consequences of his own carelessness."

The suit was therefore dismissed.

The appeal was heard by a Divisional Bench of the Court consisting of Irwin and Hartnoll JJ. The material portions of whose judgments were as follows :—

"IRWIN J. I think there can be no doubt at all that the plaintiff believed that the land was being sold free of the mortgages. He values the land at

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Rs. 40,000. Another bidder, Issac Sofaer, says it is not worth more than Rs. 40,000 to Rs. 45,000. This evidence receives the best possible corroboration from the bailiff's report made on the day of sale, viz: 'Their statements (of the three bidders) that they were bidding under a misapprehension appear to be perfectly genuine, and as the property in my opinion is not worth more than Rs. 40,000 to Rs. 45,000 at the most, I think it my duty,' etc. It is preposterous to suppose that any sane man would bid several thousands of rupees for an equity of redemption, which he believed to be worth less than nothing. The plaintiff's statement that he would not have bid a pice, if he had known that the property was sold subject to four mortgages, must be held to be perfectly true.

"This brings me to the two issues involved in the main question. Was the mistake caused by what the assistant bailiff said before the sale?"

"On the one hand, the certainty that the plaintiff and the other bidders were under a misapprehension raises a considerable probability that there was a reasonable cause for that misapprehension. On the other hand, the extreme levity, with which the plaintiff entered on this important transaction, suggests that he may have made a mistake without any adequate cause. One would expect that an average man of business, before offering a large sum of money for any property, would take some effective means to ascertain exactly what was being sold and would make some examination of the seller's title. But what does the plaintiff say? 'I heard of the sale on the day of the auction, as I was going along the road in a *ghari*. A Court peon called to me and said a Court sale was taking place. I went to the spot.' He knew no English, and the few words set out in Hindustani above was the only information he got. To bid a large sum under such circumstances as these might almost be called frivolity. I have no sympathy whatever with the plaintiff, and I think he richly deserved to lose heavily over the transaction.

"On the question what were the exact words used by the assistant bailiff, it is unfortunate that he was not examined, but no inference adverse to the plaintiff can be drawn from his absence. He was duly summoned, and was reported absent from illness."

After commenting on the evidence of the plaintiff's other witnesses the Judge said:—

"The evidence of Mr. Spencer, acting bailiff, is fully described by the learned Judge as extremely vacillating, but with all respect I cannot agree in thinking it is perfectly useless. Mr. Spencer was present. He was in charge of the sale and was responsible for the conduct of the sale, although his assistant was the actual auctioneer. The primary cause of the present unfortunate litigation was Mr. Spencer's omission to obey the plain directions contained in section 306 of the Civil Procedure Code when the deposit of 25 per cent. was not paid. This was bad enough, but his official competency must appear in a much worse light if the plaintiff succeeds in proving that he was misled by Mr. Innes' words spoken in Mr. Spencer's presence and without any attempt made by Mr. Spencer to put him right. Mr. Spencer has a strong motive for making his evidence as little damaging as possible to himself

and his assistant; and that I take to be the cause of the vacillation in his evidence. Mr. Justice Bigge acquitted him of all intention of trying to deceive, and so do I; but the motive alluded to above must have had an effect on him, and in my opinion much weight should be given to any admissions he makes in favour of the plaintiff. He first said that Innes said 'Char mortgage hai is ko upar;' but his final statement on this point was 'I cannot say for certain that Innes before the sale used the words, 'Char mortgage hai; is waste Court ka hukum se bikri hota hai.' It seems to me, considering the position Mr. Spencer was in, that, if he could have flatly denied that Innes used the words 'is waste,' he would have done so, and therefore I think his evidence goes a long way to corroborate the plaintiff.

"Notwithstanding the careless and irresponsible way in which the bidders behaved, I think it is proved that the assistant bailiff used the words attributed to him by the plaintiff.

"I am quite unable to agree with the learned Judge on the Original Side in thinking that the words in question could not bear the meaning the plaintiff assigns to them. I do not claim to be a good Hindustani scholar, but the sort of mixed patois, which Innes spoke, is quite familiar to me, and the use of the words 'is waste' would cause me to think that the land was being sold at the instance of the mortgagees. This is the meaning assigned to the words by four witnesses, and the fifth, Mr. Spencer, actually says, 'I think any reasonable man would have thought that the land was being sold free of mortgages, had he not read the proclamation.' I may add that considering Mr. Spencer's knowledge of the value of the land he can have had no doubt while the bidding was going on, if he thought of the matter at all, that all the bidders were under a misapprehension. He cannot have thought that they were all irresponsible lunatics.

"The suit was based on section 19 of the Contract Act. My finding on the facts is that plaintiff was induced to bid for the land by misrepresentation as defined in section 18, clause (3) of the same Act. But I have also found that the plaintiff had the means of discovering the truth with ordinary diligence and that he was culpably careless in failing to ascertain the truth in the obvious way, namely, by having the proclamation read and carefully translated to him. That being so, the exception to section 19 of the Contract Act puts him out of Court and the contract is not voidable by reason of the misrepresentation."

HARTNOTT J. I take the same view of the facts as my learned colleague and I have no doubt that the bidders were bidding under a misapprehension. There is evidence, the reliability of which there is no ground for questioning, that the property free of encumbrances was not worth more than Rs. 40,000 to Rs. 45,000, and it is impossible to believe that appellant and Sofaer would have made the bids they did if they had known that they would have to take it subject to the heavy mortgages existing on it. In my opinion, the words alleged to have been used by the deputy bailiff are proved to have been so used. They are a mixture of English and Hindustani and their tenor is—'There are four mortgages. On this account (or) therefore there is a sale by order of Court. The title deeds can be seen in the Office of the Registrar.'

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They do not give full details ; but they may certainly lead persons to believe that the property was not being sold subject to them, and that, on the other hand, it was being sold free of them. The bailiff allows that the property in his opinion was not worth more than Rs. 40,000 to Rs. 45,000 ; and it is strange that he did not clearly explain beyond a shadow of doubt the exact conditions of the sale when he found that bids so far in excess of the value estimated by him were being made. I certainly find that there was misrepresentation as defined in section 18 (3) of the Contract Act. There remains for consideration the important question as to whether the exception laid down in section 19 of the same Act is not applicable to the case. It was apparently not argued in the Court of first instance, nor was it argued on appeal. The exception runs as follows :—‘ If such consent is caused by misapprehension . . . the contract, nevertheless, is not voidable, if the party, whose consent was so caused, had the means of discovering the truth with ordinary diligence.’ To my mind the appellant had such means. He could have gone to the Court, and could have ascertained the exact conditions of the sale. He could have read the advertisement in the newspaper. Further, the conditions were read out in English at the sale. The purchase of immoveable property of such value was no light matter, and the casual manner in which the appellant acted seems to me to display great negligence on his part. The exercise of ordinary diligence on his part, in my opinion, would have prevented him from being misled. A few questions to the Court officers at the auction answered in a mixture of English and Hindustani was not to my mind the exercise of ordinary diligence in a matter of so important a nature. The appellant undoubtedly had the means of discovering the truth with ordinary diligence ; and I hold that the exception applies to him, and therefore that the contract is not voidable.”

The appeal was therefore dismissed.

On this appeal, which was heard *ex parte*.
Roskill, K.C., and J. W. McCarthy for the appellant, contended that the case was one of *bona fide* mistake on his part owing to his being misled by the statement of Mr. Innes, the assistant bailiff, before the sale commenced. The appellant bid for the property under the *bona fide* belief that on the terms of Mr. Innes’ announcement the property was being sold free from the mortgages and he was therefore clearly at the time of bidding under a misapprehension of the true conditions of sale. The appellant was justified in accepting the announcement of Mr. Innes, who was, for the purposes of the sale, the responsible officer of the Court, as to the terms on which the sale was taking place, and any misrepresentation

by that officer invalidated the sale to the appellant. The fact that he might have ascertained the truth by inquiry was no sufficient defence. There was therefore no negligence on the appellant's part in his not making an inquiry, and therefore section 19 of the Contract Act (IX of 1872) was not applicable. Moreover, to be a good defence under that section, the negligence must be established by facts found on the evidence in the case, and could not be set up, as in the present case, for the first time by the Court of Appeal. Reference was made to *Redgrave v. Hurd* (1): Leake on Contracts, 3rd edition, Chap. VI, page 315, 5th edition, pages 251, 252: Pollock on Contract, 7th edition (1902), pages 556, 566: and *Morgan v. Government of Haiderabad* (2). From the amount of the appellant's bids it must have been clear to the officer of the Court offering the property for sale that the appellant was under a misapprehension as to the nature of the property he was buying; and therefore the parties to the offer and its acceptance were never *ad idem*, and there was consequently no contract between them. There had also been no compliance with the conditions of sale of the Civil Procedure Code (Act XIV of 1882); and under the circumstances the appellant was entitled to equitable relief.

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The judgment of their Lordships was delivered by—
LORD MACNAGHTEN. Their Lordships regret to say that in their opinion there has been a lamentable miscarriage of justice in this case. It is an appeal from the Chief Court of Lower Burma. It was heard *ex parte*. But the facts are not open to dispute.

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At an auction sale in execution held under the direction of the Court the appellant, who had dropped in quite casually, was tempted to bid and was declared the purchaser. The thing put up for sale was knocked down to him for Rs. 38,000. The sale was conducted by two officers of the Court—a Mr. Spencer, who was Chief Clerk and officiating bailiff, and a Mr. Innes, his

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deputy, who was the auctioneer. Mr. Innes read the proclamation in English, a language which no native present seems to have understood. It stated clearly enough that only the interest of the judgment debtor was for sale. Then, in answer to a native, who asked what the proclamation said, Mr. Innes made a statement in the vernacular to the effect that the land was being sold at the instance of the mortgagees. The appellant was thus led to believe that the invitation was an invitation to bid for a substantial property freed and discharged from all encumbrances. In the result he found himself the purchaser of a shadowy equity of redemption not worth one farthing. The value of the lot unencumbered was not more than Rs. 45,000. The charges upon it were over Rs. 64,000.

As soon as the appellant realised his position he explained to Mr. Spencer that he had bid for the property under a misapprehension. Mr. Spencer reported to the Court that the appellant's statement was supported by Mr. I. Sofaer and Mr. Hadji Shah Mahomed, the other two bidders at the sale, whom he had sent for and questioned. They too, it seems, were under the same misapprehension. He added that, as their statements appeared to be perfectly genuine, and as the property in his opinion was not worth more than from Rs. 40,000 to Rs. 45,000 at the most, he thought it his duty to refer the matter to the Chief Court for orders whether, under the circumstances, the sale should be set aside and the property put up again.

The learned Judge, to whom the matter was referred, declined to interfere.

The appellant then applied to the Court to be discharged from his purchase, submitting affidavits, which showed that the misapprehension on his part was caused by a misrepresentation on the part of the auctioneer. Owing, however, to the opposition of the judgment debtor—though there was no opposition on the part of anyone else—it was thought advisable to proceed by a regular suit.

The learned Judge of first instance dismissed the suit. Then there was an appeal to the Chief Court.

The two learned Judges, who formed the Court of Appeal, were both satisfied that the appellant did bid for the property under a misapprehension, and that the misapprehension was caused by a misrepresentation made by the auctioneer. But they both held that the appellant's claim to relief failed for a reason which was not even suggested in argument either before the Court of Appeal, or before the Court of first instance. They held that, although there was a misrepresentation as defined by section 18, clause 3, of the Indian Contract Act, the case fell within the exception in section 19, which provides that in case of "consent caused by misrepresentation" the contract is not voidable, if the party, whose consent is so caused, had the means of discovering the truth with ordinary diligence. "To my mind," says one of the learned Judges, "the appellant had such means. He could have gone to the Court and could have ascertained the exact conditions of the sale. He could have read the advertisement in the newspaper. Further, the conditions were read out in English at the sale." No doubt the conditions were read out at the sale, and in English. But the appellant speaks and understands nothing but Hindustani. English is an unknown tongue to him. The other learned Judge takes the same view. He finds that the appellant was "culpably careless in failing to ascertain the truth in the obvious way, namely, by having the proclamation read and carefully translated for him." It is plain from these remarks that the negligence for which the learned Judges condemn the appellant is want of prudence in embarking so rashly on a transaction so important. The appellant had no means of discovering the truth when the auction was going on. He was perfectly justified in relying on what was said by the auctioneer in the presence and hearing of the Chief Clerk, who had charge of the sale. The exception in section 19 of the Contract Act has no application to the case. And there is no defence to the suit.

So the matter would have stood, if the question had arisen between outsiders, and the Court had had no concern in the matter beyond the duty of exercising its judicial functions. But over and above all this there is involved in this case a principle

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of supreme importance, which the learned Judges of the Chief Court entirely disregarded.

It has been laid down again and again that in sales under the direction of the Court it is incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers. The Court, it is said, must at any rate not fall below the standard of honesty which it exacts from those on whom it has to pass judgment. The slightest suspicion of trickery or unfairness must affect the honour of the Court and impair its usefulness. It would be disastrous, it would be absolutely shocking, if the Court were to enforce against a purchaser misled by its duly accredited agents a bargain so illusory and so unconscientious as this.

Their Lordships are somewhat surprised to find that the learned Judges have nothing to say on this aspect of the case. They are still more surprised at the moral lesson, which the presiding Judge draws from the story of this auction. He points out that the appellant made no investigation into the title beforehand and that he had absolutely nothing to depend upon but the announcement of the auctioneer. And his conclusion is that the appellant "richly deserved to lose heavily over the transaction."

Mr. Spencer was of course wrong in not keeping a stricter watch on the proceedings of his subordinate, but he was perfectly right in referring the matter to the Court. Both Courts censure him for not having proceeded under section 306 of the Civil Procedure Code. But that course was out of the question. If the truth had been published, nobody but a lunatic would have bid on the property being put up again. If the truth had been kept back, there would have been a gross and deliberate fraud. In either case a claim against the present appellant would have been both dishonest and futile.

Their Lordships think that the appeal should be allowed, the order of the Court of Appeal and the judgment of the Lower Court discharged with costs, to be paid by the judgment-debtor,

and a decree made setting aside the sale with costs against the judgment-debtor.

Their Lordships will therefore humbly advise His Majesty accordingly.

The judgment-debtor must pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellant: *Bramall & White.*

J. V. W.

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PRIVY COUNCIL.

P. C *
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[On appeal from the High Court at Fort William in Bengal.]

Sale—Decree—Execution of decree—Sale under decree on mortgage—Subsequent appeal from mortgage decree when Appellate Court altered decree by increasing the amount and extending time for payment by mortgagors—Effect of appellate decree on the sale—Right to possession—Application by mortgagors for restoration to possession—Limitation—Civil Procedure Code (Act XIV of 1889), ss. 244 and 311—Former order giving possession to mortgagees.

The appellants, who were mortgagees, on 20th December 1900, obtained in a suit on their mortgage in the Court of a Subordinate Judge an ordinary decree for sale of the mortgaged property, and, pending an appeal by the appellants on the ground that they were entitled to a larger amount than had been allowed them by the decree, the mortgaged property was sold on the application of, and purchased by, the appellants, and they were put into possession under an order of the High Court, dated 18th April 1904.

On the appeal from the decree of the Subordinate Judge, the High Court, on 27th January 1904, made a decree for sale conditional on the payment by the respondents, the mortgagors, of an increased amount within 6 months from the date of the appellate decree. The respondents, who had already unsuccessfully taken objections under sections 311 and 244 of the Civil Procedure Code to the sale being confirmed, then made an application under section 244 for restoration to possession on the ground that the High Court had by its decree on appeal so modified the decree of the Subordinate Judge as to render the sale under it illegal. The Subordinate Judge held that the application was not one within the purview of section 244; that it was barred by limitation; and that the decree of the High Court did not invalidate the sale, and dismissed the application.

The High Court on appeal, holding that the application was rightly made under section 244, and was not barred; and that the sale under a decree, which was subsequently substantially altered on appeal, could not be otherwise than bad, reversed the Subordinate Judge's decree, and directed that possession should be restored to the respondents, but refused to disturb the possession of the appellants pending the appeal to His Majesty in Council.

Held, by the Judicial Committee that the decree of the High Court was inconsistent with its order of 18th April 1904 giving the appellants possession.

* *Present* :—Lord Macnaghten, Lord Atkinson, Sir Andrew Scoble, and Sir Arthur Wilson.

against which no appeal had been brought, and which could not be treated as null and void; that to allow the respondents to take advantage of the error in the decree of 27th January 1904 would entail expense and delay; that the merits of the case were not with them; and they had not offered to redeem the property.

Their Lordships therefore allowed the appeal, and restored the decree of the Subordinate Judge.

APPEAL from a decree (2nd June 1905) of the High Court at Calcutta, which reversed a decree (16th July 1904) of the Subordinate Judge of Mozufferpore.

The decree-holders were appellants to His Majesty in Council.

The principal question for determination in this appeal was as to the validity of a sale held in execution of a decree on 18th August 1903.

On 25th September 1899, the judgment-debtors, the present respondents, mortgaged the properties the subject of the sale to the decree-holders, who brought a suit on the mortgage and on 20th December 1900, obtained the ordinary decree for sale from the Court of the Subordinate Judge of Muzafferpore. The judgment-debtors did not appeal from that decree; but the decree-holders preferred an appeal on the ground that they were entitled to a larger sum under the mortgage than had been allowed them by the Subordinate Judge. On 27th January 1904, the High Court allowed the appeal and made a decree for sale, conditional upon payment within six months, of Rs. 1,56,329.

Whilst that appeal was pending the decree-holders applied on 20th and 21st August 1901 to the Subordinate Judge for an order absolute for sale under section 89 of the Transfer of Property Act (IV of 1882). The applications were refused, but on application to the High Court the Subordinate Judge was, on 14th April 1902, directed to make an order absolute for sale, which he did on 14th August 1902. In pursuance of that order the property was put up for sale, and, on 18th August 1903, purchased by the decree-holders: on 14th September 1903 objections to the sale were raised by the judgment-debtors under sections 244 and 311 of the Civil Procedure Code (Act XIV of

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1882), but they were dismissed, and on 4th January 1904 the Subordinate Judge confirmed the sale. The judgment-debtors appealed from that order to the High Court and also opposed attempts by the decree-holders to obtain possession of the property purchased, but as to the possession the High Court on 18th April 1904 decided that the decree-holders were entitled to possession, and in May 1904 they were duly put into possession of the properties by the Court.

On 19th May 1904, the judgment-debtors made an application to the Subordinate Judge, which gave rise to the present appeal. It purported to be made under section 244 of Act XIV of 1882 and asked for a restoration to possession of the properties by setting aside the sale of 18th August 1903. The ground for setting it aside was stated to be the fact that on the decree-holders appeal to the High Court, that Court had by the decree of 27th January 1904 "modified" the decree of the Subordinate Judge dated 20th December 1900 and awarded the decree-holders a larger sum as due under the mortgage.

In answer to that application the decree-holders insisted on the validity of the sale, and urged that the only remedy to set it aside was by application under section 311 of Act XIV of 1882 a remedy, which was barred by limitation and had already been exhausted. They also pleaded that the orders of the High Court, dated 14th April 1902 and 18th April 1904, were final as against the judgment-debtors.

The Subordinate Judge on 16th July 1904 holding that the judgment-debtors could only apply under section 311 of Act XIV of 1882 and that such application was barred by limitation, and also that the decree of the High Court, dated 27th January 1904, did not invalidate the sale, dismissed the application with costs. In his judgment he said :—

"This application has been made only under section 244 of the Code of Civil Procedure, no mention having been purposely made in it of section 311 of the Code, under which only an execution sale is mainly set aside, because on a former occasion, an application under that section, coupled with section 244, had been made to set aside the sale, but was made unsuccessfully. There is now an appeal pending in the High Court against this Court's order, dated

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the 4th January 1904, rejecting the last-mentioned application to set aside the sale.

"The judgment-debtors, without withdrawing the appeal mentioned above, have made this application before me under section 244, Civil Procedure Code, on the strength of the ruling in the case of *Chandun Singh v. Ram Deni Singh* (1) and other rulings referred to therein.

"In the first place, I would say that the judgment-debtors' present application to set aside the sale is barred by limitation as it was not made within 30 days from the date of that sale, and no question of fraud having been now raised about it.

"In the second place I do not think that the application under notice is entertainable under section 244, Code of Civil Procedure. It does not come under clause (c) of that section, under which it was made. There is now no question in this case relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof. The question about the restoration to possession after possession has been taken by the auction purchasers, who are the decree-holders in this case, is not a question provided for by the section above quoted.

"In the case mentioned above the petition to set aside the sale must have been made under sections 311 and 244 of the Code of Civil Procedure. And, therefore, when the Court ordering the sale to be set aside on the ground that the decree, in execution of which that sale was made, was reversed by the Appellate Court, and was not in existence when the sale was made, also rightly ordered the restoration of the property to the possession of the judgment-debtors, who were ousted from it by the said sale. The present case is different from the case mentioned in the ruling. I may further observe that the latter case is distinguishable from the present, inasmuch as in that case there was an appeal against the whole decree, which was wholly reversed, and a new decree was substituted therefor by the Appellate Court. But in the case before me, there was no appeal against the portion of the mortgage decree, which was executed by the decree-holders after it was made absolute, and under which they brought to sale and purchased the judgment-debtors' properties. Therefore, that decree was not reversed. The language of the Appellate Court's order, by which it added to that decree a certain amount, which was not allowed by the Court of First Instance, could not change the substance of the thing. I take that order as directing the addition to the original decree of the amount it decreed in appeal, though it stated that it modified the original decree."

From that decision the judgment-debtors appealed to the High Court, and a Divisional Bench (Rampini and Caspersz JJ.) reversed the decree of the Subordinate Judge and directed that possession of the property should be restored to the judgment-debtors on the ground that the sale was invalid as the only

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decree capable of execution was that dated 27th January 1904, and that the proper remedy was by application under section 244 of Act XIV of 1882.

The material portion of their judgment was as follows :—

“The judgment-debtors contended before the Subordinate Judge that the sale of the 18th August 1903, held in execution of the mortgage decree, was bad, because that decree was subsequently modified; and they were not bound to pay in the decretal amount until six months from the 27th January 1904. The learned Subordinate Judge has, however, disallowed their objection. He has held (1) that the application of the judgment-debtors is barred by limitation and it was not made within 30 days from the date of the sale, and (2) that their application does not come within the purview of section 244 of the Code of Civil Procedure.

“We think that the order of the Subordinate Judge cannot be sustained.

“If the application of the judgment-debtors had been made under section 311 of the Code of Civil Procedure, no doubt the period of limitation would be 30 days; but the application being under section 244, the period of limitation is not 30 days, but 3 years.

“Then, we do not think that the learned Subordinate Judge is right in holding that the application does not come within the purview of section 244. It is certainly, in our opinion, an application relating to the execution, discharge and satisfaction of a decree; and, furthermore, we think that the sale of the 18th August 1903, under a decree, which was subsequently altered by this Court—and altered very substantially—cannot be held good. The decree, which alone can be executed in this case, is the decree of the 27th January 1904. That decree gave the judgment-debtors six months' time to redeem the property in and the sale, which was held about a year before that period had expired, must be bad.

“We therefore decree this appeal and set aside the sale of the 28th August 1903, as also the proceedings delivering possession of the property to the decree-holders.”

On this appeal, which was heard *ex parte*—

DeGruyther, K.C., and *S. A. Kyffin* for the appellants, contended that the High Court was in error in holding that the sale of 18th August 1903 was bad by reason of the decree under which the sale took place having subsequently to such sale been modified on appeal in favour of the appellants: the sale, it was argued, was valid and was not rendered illegal by the decree dated 27th January 1904 of the High Court on appeal by the appellants. All that the High Court had power to do on that appeal was to deal with the amount awarded by the Subordinate Judge; for, the respondents not having

appealed from, or filed objections to it, the rest of the Subordinate Judge's decree was final. A Court could not of its own motion deal with a portion of a decree against which portion there had been no appeal and no objections filed. Extending the time for payment of the decretal amount, as the High Court did in its decree of 27th January 1904, was an illegal exercise of its jurisdiction, and an order which that Court had no power to make under the Transfer of Property Act (IV of 1882). Reference was made to *Cheda Lal v. Badullah* (1); Transfer of Property Act, sections 88, 89, 93, and Civil Procedure Code (Act XIV of 1882), section 545 and Schedule IV, Form No. 128. There was therefore, it was submitted, no such modification by the High Court of the decree of the Subordinate Judge dated 20th December 1900, in its decree of 27th January 1904 as invalidated the sale of the property purchased by the appellants.

The only procedure to set aside the sale was by application under section 311 of the Civil Procedure Code, but that remedy had been exhausted and was barred by lapse of time. The application now under appeal, so far as it asked for the setting aside of the delivery of possession of the property to the appellants, was not one which came within the provisions of section 244 of the Civil Procedure Code, and the High Court ought so to have held.

The orders of the High Court, dated 14th April 1902 under which the order absolute for sale of the property was made, and 18th April 1904 ordering possession to be given to the appellants, were final as against the respondents and could not now be disputed; yet the judgment of the High Court now under appeal was quite inconsistent with those orders, which were binding on the respondents. The position of the parties was somewhat analogous to that in *Mungul Pershad Dichit v. Grija Kant Lahiri* (2). In any case the respondents could not be entitled to possession without redeeming the mortgage, dated 25th September 1899. The decree of the High

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(1) (1888) I. L. R. 11 All. 35, 38.

(2) (1881) I. L. R. 8 Calc. 51, 60; L. R. 8 I. A. 123, 132.

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Court [appealed from should be set aside and that of the Subordinate Judge restored.

The judgment of their Lordships was delivered by—

LORD MACNAGHTEN. This appeal was heard *ex parte*. It certainly presents something like a puzzle owing to complications which have resulted from an error committed by the appellants at one stage of the proceedings. On the whole, however, their Lordships are of opinion that the appeal ought to succeed.

On the 20th of December 1900, the appellants obtained from the Subordinate Judge of Mozufferpore an ordinary decree for a sale of some mortgaged property. The amount for which the decree was passed was Rs. 1,14,000. The appellants' claim was for a considerably larger amount. They appealed to the High Court for a modification of the decree on the ground that the amount allowed was inadequate.

In August 1901, before the appeal to the High Court came on for hearing, the appellants applied to the Subordinate Judge for an order absolute for sale. The Subordinate Judge refused the application pending the appeal. But the High Court, on the petition of the appellants, directed the Subordinate Judge to make the necessary order. In their judgment the learned Judges of the High Court say—

“It is suggested that in the appeal to this Court there may be an order or a decree for a further sum in favour of the petitioners and some confusion may result. But we have not to consider that matter at present, nor is it clear that any confusion will arise.”

On the 14th of April 1902 the order absolute was made. The property was put up for sale on the 18th of August 1903. It was purchased by the appellants. The sale was confirmed on the 4th of January 1904. But the Subordinate Judge, on the objection of the respondents, refused to put the appellants in possession.

On the 27th of January 1904, the appeal of the present appellants from the original decree of the 20th of December

1900 came on to be heard. The Court made an order modifying the decree in the appellants' favour, directing the respondents to pay the whole amount adjudged within six months, and, in case of default, directing the property to be sold.

The next important date is the 18th of April 1904, when an appeal from the refusal of the Subordinate Judge to put the appellants in possession of the property was heard. The High Court, after hearing both parties, decided that the appellants were entitled to possession. They were accordingly put into possession and have remained in possession ever since.

As the respondents were represented by counsel or pleaders on that occasion, it cannot be doubted that the attention of the High Court was called to the fact that the six months allowed by the decree of the 27th of January 1904 had not expired, and that the sale had taken place under a decree of the Subordinate Judge inconsistent with the subsequent decree of the High Court.

The objection was apparent. It could not have been overlooked. How the High Court dealt with it does not appear. It may not have been pressed by the respondents, or the High Court may have been satisfied that, under the circumstances of the case, the form of the decree was a mere slip on the part of the appellants, or the Registrar of the Court, which misled nobody.

The next step was that the respondents, on the 19th of May 1904, applied to the Subordinate Judge claiming restoration to possession by setting aside the sale of the 18th of August 1903. The Subordinate Judge dismissed the application with costs. On appeal, however, to the High Court that Court reversed the decree of the Subordinate Judge, set aside the sale, and directed that possession of the property should be restored to the respondents.

From that decree the appellants have appealed to His Majesty in Council. Pending the appeal the High Court has refused to disturb the possession of the appellants, observing that "the case is in its circumstances very peculiar."

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The appellants take their stand on the order of the High Court of the 18th of April 1904. Their Lordships think that the appellants are right and that the order now under appeal is inconsistent with the order of the 18th of April 1904, against which no appeal was brought, and which, in their Lordships' opinion, ought not now to be treated as null and void.

The merits of the case are not with the respondents. If they were allowed to take advantage of the error in the decree of the 27th of January 1904, it would only lead to expense and delay. They have not offered to redeem, and probably are not in a position to redeem, the property.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be allowed and that the order of the 2nd of June 1905 ought to be discharged, but without costs, and the decree of the Subordinate Judge of the 16th of July 1904 restored, and that any costs paid under the order of the 2nd of June 1905 ought to be repaid. Their Lordships do not think it is a case for giving the appellants any costs of the appeal.

Appeal allowed.

Solicitors for the appellants: *T. L. Wilson & Co.*

J. V. W.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Harington and Mr. Justice Fletcher.

ABU MAHOMED

v.

S. C. CHUNDER.*

1909

January 13.

Assignment—Claim for damages for breach of contract—Right of assignee to sue—Transfer of Property Act (IV of 1882), ss. 3, 6 (e), 130—"Actionable claim"—"Mere right to sue."

A claim for damages for breach of contract, after breach, is not an "actionable claim" within the meaning of section 3 of the Transfer of Property Act, but a "mere right to sue" within the meaning of section 6 (e) of the same Act, and therefore cannot be transferred. [Per Maclean C. J. and Harington J., Fletcher J. *dubitante*.]

APPEAL by the plaintiff Abu Mahomed, from the judgment of Stephen J.

By a contract, dated December 2nd, 1904, Messrs. Ebrahim Haji Sulaiman & Co. purchased from the respondent S. C. Chunder 225,000 gunny bags for delivery in equal portions during the months of January to May 1905, each month's delivery to be considered a separate contract. Delivery was duly given of the January and February portions, but the respondent failed to give delivery of the March instalment to Messrs. Ebrahim Haji Sulaiman & Co., who thereby sustained damage to the extent of Rs. 1,112-8, being the difference between the contract price of the goods and the market price prevailing on March 31st, 1905.

The purchasers, Messrs. Ebrahim Haji Sulaiman & Co., subsequently became insolvent and the estate and credits of the firm vested in the Official Assignee of Bombay. By a deed of assignment, dated June 6th, 1906, the Official Assignee assigned "all actionable claims arising from the transactions of the Bombay and Calcutta firms, whether entered in the books

* Appeal from Original Civil No. 58 of 1908.

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or not, and the benefits of all contracts entered into by the Bombay and Calcutta firms of Ebrahim Haji Sulaiman & Co.," to one Sulleman Cassim Peroo Mahomed, who again assigned the same to the appellant Abu Mahomed by a deed of assignment dated July 5th, 1906.

Abu Mahomed thereupon instituted this suit for the recovery of the sum of Rs. 1,112-8, the amount of damage which had resulted from the breach by the respondent of the contract of the 2nd December 1904. It was pleaded in defence that the plaintiff had no cause of action and that the suit was not maintainable. On the 6th August 1908, Stephen J. dismissed the suit holding that as the plaintiff was a transferee merely of a right to sue, he could not maintain the action. His Lordship's judgment was as follows :—

STEPHEN J. In this case Ebrahim Hajee Sulaiman in December 1904 entered into a contract with the defendant for the supply of a quantity of B. twills to be delivered in four monthly consignments. Pursuant to this contract two monthly consignments were delivered in January and February. The one of the 31st March 1905 was not delivered on which Ebrahim Hajee Sulaiman purchased goods in the market and as he says at the price of Rs. 1,112-8, above the contract price, Ebrahim Hajee Sulaiman then became insolvent and the Official Assignee conveyed his outstandings, assets and his interest in the execution of the contract to a purchaser, who assigned them on the 5th of July 1906 to the plaintiff. The plaintiff now sues for the Rs. 1,112-8, which are said in fact to be damages sustained by Ebrahim Hajee Sulaiman and which is the amount assessed as damages in the assignment to the plaintiff. It is objected on behalf of the defendant that the plaintiff shows no cause of action, that the claim for damages is not an actionable claim under section 3 of the Transfer of Property Act, that Ebrahim Hajee Sulaiman's claim as to damages was a mere right to sue so far as he was concerned and, if anything vested in the Official Assignee, it cannot be more than a mere right to sue with regard to the contract in question. Therefore it is argued nothing passed from the Official Assignee to the assignor of the plaintiff or consequently afterwards to the plaintiff. This contention seems to me to be sound. The claim in question cannot be an actionable claim because it is not a claim for liquidated damages, consequently there is no doubt it comes within the meaning of section 3 of the Transfer of Property Act and it also seems to me impossible that after the 31st March Ebrahim Hajee Sulaiman had anything except a mere right to sue. The contract, so far as the March delivery was concerned, was discharged by a breach on the 31st March and it then ceased to exist. Ebrahim Hajee Sulaiman then had a claim for damages and that claim is the same thing as the right to sue. I cannot

see how he or anybody deriving any right from him can have anything more than this.

It has been argued before me that clause (e) of section 6 of the Transfer of Property Act was enacted in order to prevent champertous suits, but I hold there is nothing at all in the Act to lead me to confine the operation of sub-section (e) to such suits and I must take the words as I find them. In taking this view of the case, I am considerably fortified by the judgment in *May v. Lane* (1). The question there depends on the construction of sections of the Judicature Act and the facts are not altogether similar to those of the present case. But applying the principles there laid down, I cannot hold that the present plaint does disclose any cause of action.

The suit is consequently dismissed with costs.

From this judgment, the plaintiff appealed.

Mr. Garth (*Mr. Sircar* with him) for the appellant. It is conceded that a mere right to sue cannot be assigned. But the claim in this suit is an "actionable claim" within the definition given in section 3 of the Transfer of Property Act, read with section 130, which includes within its purview "all the rights and remedies, whether by way of damages or otherwise." Section 130 of the Transfer of Property Act goes beyond section 25 of the Judicature Act and cannot be confined to debts only. At the date of the assignment the amount of damage had been ascertained. In *Jaffer Meher Ali v. Budge-Budge Jute Mills Co.* (2), Sale J. held that a contract for the purchase of gunny-bags was assignable, and this decision was not disturbed on appeal (3), and has been followed in *Nathu v. Hansraj* (4). See also *Torkington v. Magee* (5), although I submit that English authorities on this point have not much force in this country. The doctrine in *May v. Lane* (1) can have no application here. Moreover, the *dictum* in *May v. Lane* (1) has been considered in *Dawson v. Great Northern and City Railway* (6) and has been interpreted to mean that equity will not allow an assignment by way of champerty. This principle has no application in India. The last-mentioned case was the case of a claim to compensation under the Lands Clauses Act

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(1) [1894] 64 L. J. Q. B. 236.

(4) (1906) 9 Bom. L. R. 114.

(2) (1906) I. L. R. 33 Calc. 702.

(5) [1902] 2 K. B. 427.

(3) (1907) I. L. R. 34 Calc. 289.

(6) [1905] 1 K. B. 260, 270.

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and it was held such claim was assignable. There is no distinction between such a claim and a claim to damages under a contract as in the present case. [Fletcher J. referred to *William Brandt's Sons & Co. v. Dunlop Rubber Company* (1), and *Swan and Cleland's Graving Dock and Slipway Company v. Maritime Insurance Company and Croshaw* (2). The Judicature Act did not take away the rights of assignment that existed before the Act. If this is not an "actionable claim," you stand in the same position as you would have stood before the Transfer of Property Act. There is no section in the latter Act to cover the transfer of sums to become due in the future. Does that not shew that the Transfer of Property Act is not exhaustive?] My submission is that the claim was assignable under the Transfer of Property Act, and in the alternative, if the claim does not fall within the Act, it was assignable in equity. There is no distinction in principle between the assignability of a contract, and the assignability of a claim to damages under a contract.

Mr. Dunne (*Mr. A. N. Chaudhuri* with him) for the respondent. There can be no question here of adding parties. The case as made is on an absolute assignment, and, if the claim is not assignable, the appellant must fail.

The question in issue is whether a claim to damages resulting from a breach of contract, is assignable after breach, whether (i) under the Transfer of Property Act, or (ii) in Equity. I submit the Transfer of Property Act is exhaustive and deals with *all* the means of transfer in India. Section 3 defines an "actionable claim," which is assignable under section 130. These two sections contemplate the assignment of the benefit of a contract *before breach*. See *Jaffer Meher Ali v. Budge-Budge Jute Mills Co.* (3). The words "whether by way of damages or otherwise" in section 130, mean that the beneficial interest in a contract includes the right to recover damages for its breach. A debt or a beneficial interest in a contract is

(1) [1905] A. C. 454.

(2) [1907] 1 K. B. 116.

(3) (1907) I. L. R. 34 Calc. 289.

moveable property, but in the present case, there was no assignment of any contract : the contract was exhausted and discharged by breach, and all that was left, was a mere right to sue for damages. See Leake on Contracts, 5th edition, page 616. A right to recover damages for breach of contract is not assignable. See *May v. Lane* (1), in which the *dictum* though *obiter* has the authority of such eminent lawyers as Esher M. R. and Rigby L. J. *Torkington v. Magee* (2) did not overrule *May v. Lane* (1), but was distinguished. The decision in *Dawson v. Great Northern and City Railway* (3) was on a totally different ground, and nowhere was any doubt cast on the doctrine as laid down in *May v. Lane* (1). In *William Brandt's Sons & Co. v. Dunlop Rubber Company* (4) the assignment was one of a debt, which is obviously a chose in action and would fall within section 3 of the Transfer of Property Act. All that *Swan and Cleland's Graving Dock and Slipway Company v. Maritime Insurance Company and Croshaw* (5) held was that the doctrine in *May v. Lane* (1) did not apply to a policy of maritime insurance. [Fletcher J. referred to *King v. Victoria Insurance Company* (6).] That case did not turn on the question of assignment : the Insurance Co. were subrogated to the rights of the assured. Cases which have considered *May v. Lane* (1) and distinguished it, have pointed out that the doctrine in that case must not be interpreted too widely so as to cover cases of the assignment of the benefit of contracts *including the right to sue thereunder*, but no case has challenged the proposition that after breach of contract, the right to sue for damages for such breach cannot be assigned.

Mr. Garth, in reply. The assignment in the present case was not merely of the right to recover damages as in *May v. Lane* (1), but of the benefits of a contract, in respect of which the assignor had certain rights to recover damages. Breach discharges a contract only in a certain sense : the con-

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(1) (1894) 64 L. J. Q. B. 236.

(2) [1902] 2 K. B. 427.

(3) [1905] 1 K. B. 260.

(4) [1905] A. C. 454.

(5) [1907] 1 K. B. 116, 123.

(6) [1896] A. C. 250.

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tractual rights still obtain for certain purposes, *e.g.*, founding a right of action on the contract.

MACLEAN C. J. The facts of this case lie within a very narrow compass : It appears that by a contract dated the 2nd of December 1904, Messrs. Ebrahim Hajee Sulaiman & Co. purchased from the defendant a certain quantity of B. twills,—so many hundred bags ; delivery from January 1905, so many bags a month. Certain of those bags were delivered in pursuance of the terms of the contract, but in March 1905 the defendant did not deliver the bags deliverable for that month, and loss, as the plaintiff says, resulted to the purchasers from that default on the part of the vendor. The purchasers, Messrs. Ebrahim Hajee Sulaiman & Co., eventually became insolvent, and the Official Assignee of Bombay conveyed the outstanding assets and their interests in the executory contracts to one Sulaiman Cassim Peroo Mahomed, who again assigned his interest in those contracts to the plaintiff by an assignment deed, dated the 5th of July 1906. The Official Assignee by his assignment, which is dated the 6th of June 1906, assigned “all actionable claims arising from the transactions of the Bombay and Calcutta firms, whether entered in the books or not, and the benefits of all contracts entered into by the Bombay and Calcutta firms of Ebrahim Hajee Sulaiman and Company,” to Sulaiman Cassim Peroo Mahomed ; and he assigned the same over to the plaintiff. The plaintiff then brought this action : and the first point taken and successfully taken by the defendant is that the plaintiff cannot maintain the suit : and Mr. Justice Stephen held that, as the plaintiff was a transferee merely of a right to sue, he could not maintain the action.

The question we have to decide depends upon two or three short considerations. As I have noticed the contract had been broken and the right to damages had accrued before anything was vested in the Official Assignee under the insolvency : that of course is a very material feature in the case.

The first question is whether, as regards the particular case we are dealing with, that which the plaintiff purchased was a mere right to sue, or if it were not that, what it was. Under section 6 of the Transfer of Property Act, the Statute enacts that "a mere right to sue cannot be transferred" and, it is noticeable that the language of that section is much wider than was the language of the corresponding section in the Transfer of Property Act, which was thereby repealed. If this was a mere right to sue, it cannot be transferred. Now what can be transferred under the Act? Any actionable claim can be transferred: and section 130 points out how it may be transferred. What is an actionable claim? If we look at section 3 'an "actionable claim" means a claim to any debt': but this is not a claim to any debt; this is a claim to damages of an unascertained amount resulting from a breach of contract on the part of one of the parties to that contract. Is it then a "claim to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional, or contingent?" I do not think that we can properly bring a mere claim for damages for breach of contract within those words. Now, if it does not fall within the definition of "actionable claim," what is it except a mere right to sue, a mere right to sue for damages resulting from an alleged breach of contract. It seems to me that it is not anything more or less than that; and if so, that cannot be transferred.

It is clear, whatever the principle may be underlying it, that according to the English law an assignment of damages for an alleged breach of contract would not entitle the assignee to sue; and, if one may speculate, the words, "a mere right to sue cannot be transferred" in the Transfer of Property Act are based upon the same principle. However in these cases we must ascertain what the law in India and not in England here enjoins. I have referred to the sections of the Transfer of Property Act, which deal with the matter. In

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this view it does not seem necessary to discuss the English authorities, which have been cited, though several of them appear to be in accord with the view I have stated.

For these reasons Mr. Justice Stephen's view seems to be right and the appeal must be dismissed with costs.

HARINGTON J. I agree, and I think the position of the seller and the buyer at the expiration of the month of March was this—the seller had to deliver certain goods and he had failed to do so. The result was that the benefit with regard to the contract for delivery during the month of March was at an end; and all that the buyer was to do was to sue the seller for damages for breach of the contract, which the seller had failed to perform. Some months after the breach of this contract, the present plaintiff became, under a deed of assignment, entitled *inter alia* to the actionable claims to which the original buyer was entitled. The question really resolves itself into this: was this right to recover damages for the breach of contract, which could no longer be fulfilled, an actionable claim or merely a right to sue. In my opinion, it was merely a right in the buyer to sue for such damages as he might be able to prove he had sustained. Those damages might merely be nominal or, on the other hand, they might be substantial. If that were so, then that right could not be passed under the assignment, by virtue of the provisions of section 6 of the Transfer of Property Act, clause (e) and, moreover, the assignment does not purport to pass anything more from the buyer than the actionable claims to which he was entitled. Then, if the definition of 'actionable claim,' given in the Transfer of Property Act is looked at, it is clear, I think, that a right to sue for damages—unascertained damages, consequent upon a breach of contract, does not fall within that definition.

The result is that I agree that the judgment of the learned Judge in the Court of first instance was right and that this appeal should be dismissed.

FLETCHER J. I do not dissent : but I feel very considerable doubt that the Statute meant to limit the right of a person to assign his right under a contract by the fact that the other party to the contract had broken it.

Appeal dismissed.

Attorneys for the appellant : *Manuel & Agarwalla.*

Attorney for the respondent : *N. G. Roy.*

J. C.

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APPEAL FROM ORIGINAL CIVIL.

*Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice
Harrington and Mr. Justice Brett.*

1908
December 2.

BURN & Co.

v.

MCDONALD.*

Contract—Injunction—Breach of contract—Contract of personal service—Agreement—Absence of negative agreement—Negative covenant implied—Specific Relief Act (I of 1877), s. 57, also illustration (d)—Restraint of trade—Damages—Contract Act (IX of 1872), s. 74—Codified law.

By an agreement made in England, M. was engaged by B. & Co. a firm of Engineers in Calcutta, as an assistant in their firm for a period of 5 years, and it was *inter alia* agreed that "he should diligently and to the best of his ability devote himself to the duties incumbent on him and should faithfully observe and comply with such instructions as he might from time to time receive from the firm." During the term of his engagement, M. left the employ of B. & Co. and entered that of another firm. On a suit, instituted by B. & Co., for an injunction to restrain M. from serving, working or being employed by any other person or persons and for damages.

Held, although there was no negative condition in terms in the agreement, a negative covenant could be properly implied, under section 57 of the Specific Relief Act, and illustration (d) thereto, which gave legislative sanction in India to the law as laid down by Selborne L. J. in *Wolverhampton and Walsall Railway Company v. London and North-Western Railway Co.* (1).

Charlesworth v. MacDonald (2) approved.

Lumley v. Wagner (3), *Whitwood Chemical Company v. Hardman* (4), *Ehrman v. Bartholomew* (5) referred to.

Where the law has been codified, it is of little avail to enquire what is the law apart from such codification: the Code itself must be looked to as the guide in the matter.

As the contract had been most deliberately broken the plaintiffs were entitled to an injunction according to the principles of equity, justice and good conscience.

APPEAL FROM ORIGINAL SUIT.

APPEAL by the plaintiffs, Burn and Co., from the judgment of Fletcher J.

* Appeal from Original Civil No. 460 of 1908 in Suit No. 241 of 1908.

(1) (1873) L. R. 16 Eq. 433, 440. (3) (1852) 5 De. G. and S. 485.

(2) (1898) L. L. R. 23 Bom. 103, 113. (4) [1891] 2 Ch. 416.

(5) [1898] 1 Ch. 671.

This action was instituted by Messrs. Burn and Co., Ltd., a firm of engineers carrying on business in Calcutta, and the neighbourhood, against the respondent, who was formerly one of the assistants employed in their firm, for an injunction and damages for breach of agreement.

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By an agreement made in England, and dated the 27th July 1904, between the appellant Company and the respondent, the Company engaged Mr. McDonald as draughtsman and general assistant in its engineering works at Howrah near Calcutta or elsewhere for a period of 5 years from and after the date at which he should begin to work after his arrival at the engineering works at Howrah, it being agreed that he should forthwith proceed to Calcutta, the Company providing him with a second class passage. The respondent's remuneration was fixed at Rs. 250 per month for the first year of his service, with annual increments of Rs. 25, to be paid "monthly or as may be mutually arranged," with certain other allowances.

Certain other clauses in the memorandum of agreement, were as follows :—

(3). "On the arrival at Calcutta of the said Colin McDonald he shall at once report himself at the said engineering works at Howrah aforesaid and enter upon his duties aforesaid and during the said period of this agreement he shall diligently and to the best of his ability devote himself to the duties incumbent on him as aforesaid and shall faithfully observe and comply with such instructions as he may from time to time receive from the said Messrs. Burn & Co., Ltd., or their authorised representative for the time being."

(6). "At any time during the said period of this agreement the said Messrs. Burn & Co., Ltd., shall be entitled to terminate the said engagement and that without assigning any reason for so doing in which event they shall make payment of one month's salary to the said Colin McDonald and payment of a second class passage home to this country, provided always that the obligation to provide such passage shall not be binding or operative, unless the said Colin McDonald shall within one calendar month from the termination of his engagement depart from India with the intention of returning to this country. But in the event of the said dismissal being caused by the said Colin McDonald's (a) insobriety, (b) unpunctuality in attendance to business, (c) carelessness and inattention to or neglect of work or duties, (d) disobedience of orders given by the said Messrs. Burn & Co., Ltd., or his immediate superior, (e) illness brought on or induced by misconduct or disobedience to the Doctor's orders, (f) breach of confidence with reference to any of the business secrets of the firm, (about any of which the said

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Messrs. Burn & Co., Ltd., or their representative shall be the sole-judge), the said Colin McDonald shall have no claim for salary after having been duly warned on at least one occasion, further than up to the date of his dismissal or for a passage home as before provided for the said Colin McDonald."

(8.) "The said Colin McDonald shall be bound, if and when required by the said Messrs. Burn & Co., Ltd., to assist them in any other department of their business and, if required, to go to any other place in the East in connection with their business."

(10.) "The said Colin McDonald shall be bound, if required, on his arrival at Calcutta to confirm this engagement in conformity with the laws of the place to the effect that the same may be capable of enforcement there."

(12.) "Both parties bind and oblige themselves to perform their respective parts of the premises to each other under the penalty of one hundred pounds to be paid by the party failing to the party performing or willing to perform over and above performance."

It is to be observed there was no express negative covenant in the agreement restraining the respondent from taking service under any other firm, during the term of his employment by Messrs. Burn & Co.

The respondent arrived in Calcutta on the 13th October 1904 and immediately entered upon his duties under the agreement as an assistant of Messrs. Burn and Co. at Howrah, and continued to perform his duties and to be so employed till the 3rd March 1908.

It appears that on the 18th February 1908, Mr. McDonald having secured a post under the firm of Raja Sreenath Roy and Bros., wrote to Messrs. Burn and Co. tendering his resignation and proposing to leave their employment from the 15th March following. On the 19th February 1908, Messrs. Burn and Co., replied declining to accept the resignation and giving Mr. McDonald notice that "they would take legal steps to enforce the terms of his agreement with them." Some further correspondence passed and on the 3rd March 1908, on the respondent's request for his salary for the month of February, he was informed that the office had instructions to withhold his salary for the present. Thereupon, on the 4th March 1908, Mr. McDonald left the service of Messrs. Burn & Co., upon the pretext of the firm's refusal to pay him his

salary for February. On the 17th March 1908, the respondent entered the service of Raja Sreenath Roy & Bros.

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On the 21st March 1908, Messrs. Burn & Co. instituted this suit, asking for Rs. 2,000 as damages and for an injunction "to restrain the defendant from serving, working or being employed by the said Raja Sreenath Roy & Bros. or any person or persons other than the plaintiff company, until the said agreement dated the 27th July 1904 should have been determined by effluxion of time, that is, until the 13th October 1909."

The defendant denied breach of the agreement on his part, and alleged that the company had committed breach of the agreement by compelling the defendant to do various works not contemplated by the agreement, and by their refusal to pay his salary for February 1908 on the 3rd March 1908, and submitted that in any event the company were not entitled to the injunction sought.

The rule *nisi* for an *interim* injunction was discharged by Chitty J. on the 10th April 1908, but an order was obtained expediting the hearing of the suit.

The suit came on for hearing before Fletcher J., who on the 14th May 1908 refused to grant an injunction and gave a decree for Rs. 30 by way of damages, observing—

FLETCHER J. This is a suit brought by Burn & Co., Ltd., against one Colin McDonald, who was formerly one of the assistants employed in their firm, for an injunction and damages for breach of agreement.

The defendant entered into the service of the plaintiffs' firm under an agreement, dated the 27th July 1904, and made in England between one of their authorised agents of the one part and the defendant of the other part. The term of the agreement is for five years commencing from and after the date at which the defendant should begin to work under the agreement after his arrival at the engineering works of the plaintiffs at Howrah.

By the third clause of the agreement it is provided that on arrival of the defendant in Calcutta he shall at once report himself at the said engineering works at Howrah and enter upon his duties and shall diligently and to the best of his ability devote himself to the duties incumbent on him and shall faithfully observe and comply with such instructions as he may from time to time receive from the plaintiffs' firm.

No obligation under the contract is imposed on the plaintiffs to employ the defendant for the period of five years. The contract provides that, if

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the defendant breaks this agreement he shall be liable to a penalty of £100 to be paid to the plaintiffs.

The defendant in his written statement denies that he has committed any breach of the agreement. As I am of opinion that the defendant by leaving the plaintiffs' employ committed a breach of his agreement, I have first to decide whether or not the plaintiffs are entitled to an injunction.

Now, by section 57 of the Specific Relief Act, it is provided that when a contract comprises an affirmative agreement to do a certain act coupled with a negative agreement express or implied not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement.

From this section it appears first, that there must be in this contract a negative agreement express or implied and, secondly, the jurisdiction conferred on the Court is a discretionary jurisdiction.

Then, first, does the contract contain a negative agreement express or implied?

"Every agreement to do a particular thing in one sense involves a negative. It involves the negative of doing that which is inconsistent with the thing you are to do, but it does not at all follow that, because a person has agreed to do a particular thing, he is therefore to be restrained from doing every thing else, which is inconsistent with it" (*per* Lindley L. J. in *Whitwood Chemical Company v. Hardman* (1)).

In my opinion, it is impossible to infer from the contract in question a negative agreement by which the defendant undertook that, whether the plaintiffs should or should not continue to employ him, he would not during the period of five years from the commencement of the agreement work for any one else in the world.

But even if I had come to the conclusion that such a negative agreement should be implied I should have held such agreement to be void as being in restraint of trade and being wider than what was necessary for the reasonable protection of the plaintiffs.

The defendant has, however, raised a defence which I had better deal with before I come to the question of damages.

This defence is that the punctual payment of the defendant's salary under the agreement on the first of every month is a condition precedent to his continuing to serve under the plaintiff company. Clause 4 of the agreement provides for payment monthly or as may be mutually arranged, of salary to the defendant at certain rates with allowances during the several years of his employment.

Now what are the facts?

From October 1904 to the 3rd March 1908 the defendant continued to serve in the plaintiffs' firm. Having replied to an advertisement in the papers he secured a post under another firm.

On the 18th February, he gave notice to the plaintiffs that he intended to leave their firm on the 15th March following.

He did not actually join the other firm until the 17th March though he absented himself from the plaintiffs' firm from the 4th March. During the period of that notice at the end of February his pay for February became due, but the plaintiffs stopped his pay to see whether the defendant carried out what he stated to be his intention in his letter of the 18th February.

Considering all the circumstances, I think the plaintiffs were justified in withholding the defendants' pay during the currency of the notice by which the defendant intended to commit a breach of his agreement.

That being so, the suit resolves itself into a question of damages.

Now, what is the measure of damages that the plaintiffs are entitled to ?

The plaintiffs' witness says that it costs about Rs. 550 to bring out a new man from England, that Rs. 100 has to be paid to him on the voyage out and about Rs. 350 for advertisement charges, and the agent's fees have to be paid in England. In the present case no special damages can be made out because the plaintiffs' own case is that immediately the defendant left their firm, they employed one Mr. Gilflan in his place, though he is not a permanent hand. He is not drawing a bigger salary than the defendant. It is probable that, if the defendant had performed his agreement, the plaintiffs would, at the end of about another year and a half, have had to bring out another man from England to fill the defendant's place.

The plaintiffs are therefore entitled by way of damages to the interest they will lose by having to lay out this sum earlier than they would otherwise have had to have done. I accordingly award to the plaintiffs Rs. 30 as damages for the defendant's breach of his agreement.

I make no order as to the costs of this suit.

There remains only the question of costs of the plaintiffs having obtained an *ex parte* injunction restraining the defendant from joining and working for the firm of Raja Sreenath Roy. The injunction was subsequently discharged, but the costs were reserved. From the facts disclosed, it appears that the plaintiffs were wrong in obtaining the injunction and they must pay to the defendant his costs of having that injunction discharged.

From this judgment, the plaintiff company Burn & Co., Ltd., appealed.

Mr. Buckland for the appellant company. The facts of this case are entirely covered by section 57 of the Specific Relief Act. The Court can import the negative covenant by the respondent, not to take service under any other firm during the period of his agreement, and has power to grant an injunction restraining him from doing so. See *Madras Railway Company v. Thomas Rust* (1). Illustration 4 to section 57 is to the point. See *Callianji Harjivan v. Narsi Tricum* (2)

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(1) (1890) I. L. R. 14 Mad. 18.

(2) (1894) I. L. R. 18 Bom. 702, 708.

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and the observations of Farran C. J. on appeal (1). It is true the present tendency of the English Courts is to limit the application of *Lumley v. Wagner* (2), but the Specific Relief Act has adopted the principle and contains the law to be applied in India, and even in England "when the importation of a negative quality into an affirmative agreement is not against the meaning of the agreement, the Court will import the negative quality and restrain the doing of acts inconsistent with the agreement." See Kerr on Injunctions, 4th edition, page 394. See also *Webster v. Dillon* (3), *Montague v. Flockton* (4), *Wolverhampton and Walsall Railway Co. v. London and North-Western Railway Co.* (5) and *DeMattos v. Gibson* (6), which was followed in *Haji Abdul Allarakhi v. Haji Abdul Bacha* (7). The negative covenant, if imported, would not be in restraint of trade within the meaning of section 27 of the Contract Act. See *Charlesworth v. MacDonald* (8) and *The Brahmaputra Tea Co. Ltd. v. Scarth* (9). The jurisdiction to grant an injunction is discretionary with the Court, and on this question the Court will consider the great disadvantage employers of skilled labour are at, in this country, and the great trouble and expense they would be put to, to replace competent employees, who choose to break their contracts of service. In the alternative, if the injunction prayed for be refused, it is submitted the damages awarded by the Court of first instance are inadequate and not "reasonable compensation" within the meaning of section 74 of the Contract Act. See *The Brahmaputra Tea Co. Ltd. v. Scarth* (9).

Mr. Avetoom (*Mr. Stokes* with him) for the respondent. It is conceded that the Court has the power to grant the injunction, but it is submitted that the jurisdiction is discretionary, and that this is not a proper case where an injunction should be granted. The agreement was unfair, one-sided and want-

(1) (1895) I. L. R. 19 Bom. 764, 767.

(2) (1852) 5 De. G. and S. 485.

(3) (1857) 3 Jur. N. S. 432.

(4) (1873) L. R. 16 Eq. 189.

(5) (1873) L. R. 16 Eq. 433.

(6) (1858) 4 De. G. and J. 276.

(7) (1881) I. L. R. 6 Bom. 5.

(8) (1898) I. L. R. 23 Bom. 103.

(9) (1885) I. L. R. 11 Calc. 544,
545, 550.

ing in mutuality. To grant an injunction in a case like the present would amount in substance to a decree for specific performance. See *Callianji Harjivan v. Narsi Tricum* (1). [Maclean C. J. How do you reconcile this with the judgment of Farran C. J. in *Charlesworth v. MacDonald* (2)?] In the absence of any negative stipulation in the agreement, the company are not entitled to an injunction to restrain their employee from entering the service of another firm. See *Whitwood Chemical Company v. Hardman* (3). An agreement for personal service cannot be enforced otherwise than by an action for damages, though it may possibly be enforced in certain exceptional cases, not to be extended, where there is a strictly negative stipulation. See *Davis v. Foreman* (4).

At the conclusion of the argument it was mentioned by Counsel that the respondent was now willing to return to the service of the appellant company, and the latter were willing to take him back.

MACLEAN C. J. The plaintiffs in this case are a firm of Engineers in the neighbourhood of Calcutta, and the defendant entered into a contract with them to act as a draughtsman and general assistant in their business at Howrah. That agreement was reduced into writing. It is dated the 27th of July 1904, and was made in England; the defendant was then in England, and he came out here, the plaintiffs paying the expenses of his passage out. By that agreement he covenanted that on his arrival at Calcutta he should "at once report himself at the said Engineering Works at Howrah aforesaid and enter upon his duties aforesaid and during the said period of this agreement he should diligently and to the best of his ability devote himself to the duties incumbent on him as aforesaid and should faithfully observe and comply with such instructions as he might from time to time receive from the said Messrs. Burn & Co., Ltd., or their authorised representative

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(1) (1895) I. L. R. 19 Bom. 754, 768.

(3) [1891, A. C. 416.

(2) (1898) I. L. R. 23 Bom. 103, 112,

(4) [1894, 3 Ch. 654, 657.

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for the time being.” There are other provisions in the contract, namely, as to the conditions upon which the defendant might be dismissed by Messrs. Burn & Co., but they are not material. In the 12th paragraph both parties “bound and obliged themselves to perform their respective parts of the premises to each other under the penalty of one hundred pounds to be paid by the party failing to the party performing or willing to perform over and above performance.” In accordance with the terms of that agreement, the defendant came out from England and entered upon his duties as an assistant with Burn & Co. and he seems to have discharged those duties very satisfactorily, I find nothing to the contrary, for some three and a half years. But on the 18th of February 1908, he wrote to his employers a letter, the effect of which was that he proposed to resign and leave that employment on the 15th of March next. To that Messrs. Burn and Co. replied that “they declined to accept the resignation and gave him notice that they would take legal steps to enforce the terms of his agreement with them.” We need not refer further to the correspondence in detail. It is sufficient to say that early in March, on the pretext that the plaintiffs had refused to pay him his February salary, the defendant left the firm’s service and took employment with the firm of Raja Sreenath Roy and Brothers. The plaintiffs then instituted this suit, and asked for damages and “for an injunction to restrain the defendant from serving, working or being employed by the said Raja Sreenath Roy and Brothers or any person or persons other than the plaintiff company.” I ought to have said that the agreement was to last for five years, which expired on the 13th of October 1909.

The matter was tried before Mr. Justice Fletcher, and he refused to grant an injunction; he gave the plaintiffs Rs. 30 by way of damages and no costs of the suit. In fact he ordered the plaintiffs to pay the costs of an application for an interlocutory injunction. The plaintiffs have appealed.

There is no dispute as to the facts; and I will deal as shortly as I can with the legal points which have been raised. It is suggested that in a case of this sort, the Court ought not to

grant an injunction, that the question of granting or refusing an injunction is one which lies in the exercise of the judicial discretion of the Court, and that in a case such as the present it ought not to be granted. We have been referred to the law in England on the subject. The law of England no doubt is that a mandatory injunction will not be granted for the specific performance of a personal service—but ever since the day of *Lumley v. Wagner* (1), which is a decision now some 50 to 60 years old, it has been laid down that, although the Court cannot grant a mandatory injunction to that effect, yet where in the agreement there is a negative clause, that is to say, a clause to the effect that the contracting party will not serve anybody else, effect can be given to that and an injunction granted. In the present contract there is no such negative condition in terms. But, although I do not think that authorities in England are very useful to us, in dealing with questions codified by the law of India, I should like to call attention to the observations of Lord Selborne, then Lord Chancellor sitting as Master of the Rolls in the case of *Wolverhampton and Walsall Railway Co. v. London and North-Western Railway Company* (2). The passage I propose to read is at page 440. This is what this great Judge says:—"With regard to the case of *Lumley v. Wagner* (1), to which reference was made, really when it comes to be examined, it is not a case which tends in any way to limit the ordinary jurisdiction of this Court to do justice between parties by way of injunction. It was sought in that case to enlarge the jurisdiction on a highly artificial and technical ground and to extend it to an ordinary case of hiring and service, which is not properly a case of specific performance, the technical distinction being made, that if you find the word "not" in an agreement "I will not do a thing" as well as the words "I will," even although the negative term might have been implied from the positive, yet the Court, refusing to act on an implication of the negative will act on the expression of it. I can only say, that I should think it was the safer and the better rule, if it should eventually be adopted by this Court, to look

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(1) (1852) 5 De. G. & S. 485.

(2) (1873) L. R. 16 Eq. 433, 440.

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in all such cases to the substance and not to the form. If the substance of the agreement is such that it would be violated by doing the thing sought to be prevented, then the question will arise, whether this is the Court to come to for a remedy. If it is, I cannot think that ought to depend on the use of the negative rather than an affirmative form of expression. If, on the other hand, the substance of the thing is such that the remedy ought to be sought elsewhere, then I do not think that the form ought to be changed by the use of a negative rather than an affirmative."

If it had been necessary I should have applied that principle to the present case, but here we have to deal with the law in India. The law in India on this subject is codified and, it has been laid down in the House of Lords, by the Judicial Committee and in several cases in this Court, to some of which I myself was a party, that where the law has been codified it is of little avail to enquire what is the law apart from such codification, but we must look to the Code itself as our guide in the matter. The law here is codified by section 57 of the Specific Relief Act. That seems to me to make the case reasonably clear. That section runs as follows :—"Notwithstanding section 56, clause (f)"—clause (f) says that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced—"Where a contract comprises an affirmative agreement to do a certain act coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement, shall not preclude it from granting an injunction to perform the negative agreement; provided that the applicant has not failed to perform the contract so far as it is binding on him." The language of that section is reasonably clear, and it appears to give legislative sanction in India to the view expressed by Lord Selborne in the passage I have read. If there had been any doubt as to the meaning of the language of the section, illustration (d) is conclusive upon the subject. It runs :—"B contracts with A that he will serve him faithfully

for twelve months as a clerk. A is not entitled to a decree for specific performance of this contract. But he is entitled to an injunction restraining B from serving a rival house as clerk." The view I entertain coincides with that of the late Chief Justice Farran in the case of *Charlesworth v. MacDonald* (1). In that case the Court thought that there was a negative covenant, although the terms of the agreement were not very clear. After dealing with the case of *Lumley v. Wagner* (2) Farran C. J. says: "In my opinion it would be most unfair to gentlemen in the position of the plaintiff not to protect them in such cases. It would virtually debar them from engaging an assistant at all. An action for damages would afford them no protection, certainly no adequate protection;" and, in a previous part of his judgment he refers to section 57 of the Specific Relief Act and speaks of it "as a legislative decision to the same effect." Now, can we in the present case properly say that a negative covenant is implied?

I feel no doubt about it. Here the covenant is that the defendant will diligently and to the best of his ability devote himself to the duties as a draftsman and general assistant. Surely when a man says that he will devote himself during a period of years to the business of a particular firm, it does imply that he will not give his services during that period to any other firm. It would be dangerous to hold the contrary. Here to my mind, an injunction is not only the most effective but the only remedy according to the principles of equity, justice and good conscience. To give damages in a case of this sort—damages, which perhaps will never be recovered—will be a very small consolation to the plaintiffs. It is said that if we grant an injunction the defendant will starve. We have nothing to do with that; he ought to have thought of that, before he deliberately broke his contract;—as a matter of fact there is no vista in that direction as the defendant is willing to go back and the appellants are willing to take him back into their service. It is important in this country that

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(1) (1898) I. L. R. 23 Bom. 103, 113. (2) (1852) 5 De. G. & S. 485.

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assistants should know when they enter into contracts of this nature, when they are brought out to India at considerable expense by their employers, that they cannot treat their employers in this high-handed fashion. They must honestly and faithfully perform their contracts. If the defendant's argument was well-founded he might have left Burn & Co., at the end of a week instead of at the end of three years. Here we have a case in which the contract is deliberately entered into and most deliberately broken. In my opinion, the plaintiffs are entitled to that special remedy, which the principles of equity, justice and good conscience demand, of an injunction to prevent the defendant from breaking his contract. There is no suggestion in the pleadings—there is not one word in the evidence, that Burn & Co. have not treated him properly. In fact they are willing to take him back.

It is not necessary, as we are asked for and are granting an injunction, to go into the question of damages; but I do not desire to be understood as agreeing with the principle upon which the Court of first instance has given Rs. 30 as damages. I can scarcely think that the learned Judge would have done this, had his attention been attracted to section 74 of the Indian Contract Act.

The result, therefore, is that the decision of Fletcher J. is reversed and that a decree must be made for an injunction in terms of the prayer and that the defendant must pay the costs of the suit and the appeal, including those of the interlocutory injunction.

HARINGTON J. I agree: but, inasmuch as we are differing from the learned Judge in the Court of first instance, I propose to add a few words.

The agreement between the plaintiffs and the defendant was that the plaintiffs should employ the defendant for a period of five years and that the defendant should serve the plaintiffs during that period, and there was a stipulation that, if either the plaintiffs failed to perform their part of the agreement

or the defendant failed to perform his part, a sum of £100 should be payable by the party in default to the one who was ready to carry out the agreement. Now, while the defendant was employed under that contract of service he appears to have seen an advertisement, which attracted him, he desired therefore to quit the services of the plaintiffs. It appears that he first spoke to the plaintiffs' manager about his desire to leave and the result of that conversation was a letter declining to forego, on behalf of the firm, any part of the agreement and pointing out to the defendant that, if he desired to quit the services of the firm, he could do so, at a month's notice, on paying the amount stipulated in the agreement. In reply to that the defendant wrote declining to pay the sum of money stipulated under the agreement, because, he said, he was not in a position to do so, and asking the firm to accept his resignation. That the firm declined to do and subsequently, against the wishes of the plaintiffs, the defendant quitted their services and thereby broke the agreement, which he had entered into with them. Now, the plaintiffs ask for an injunction to prevent the defendant from entering into the service of a rival firm and giving them the advantages of his skill.

It is said that no injunction ought to be granted on two substantial grounds. One is that the agreement contained no negative stipulation under which the defendant undertook not to serve any rival firm of Engineers; and, secondly, on the ground that the granting of an injunction is an indirect means of enforcing a covenant, of which the specific performance would not be granted, that is to say, a covenant to perform a personal service.

Now, no doubt, these two grounds influenced the learned Lord Justices in England, who decided the case of *Whitwood Chemical Co. v. Hardman* (1): and they were further influenced by the danger, which they considered there was, in a country like England, of extending the case of *Lumley v. Wagner* (2). The case of *Whitwood Chemical Co. v. Hardman* (1)

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(1) [1891] 2 Ch. 416.

(2) (1852) 5 De G. & S. 485.

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was afterwards followed by Mr. Justice Romer in the later case of *Ehrman v. Bartholomew* (1), in which, in refusing an injunction, the learned Judge adopted and assented to the observations of the Lord Justices in *Whitwod Chemical Co. v. Hardman* (2) as to the danger of extending the case of *Lumley v. Wagner* (3). So if those cases represented what was the law here, there might be, at any rate, a good deal to be said on behalf of the respondent. But the answer is that the law here is expressed in section 57 of the Specific Relief Act, which provides that an injunction may be granted for a negative agreement, either express or implied, notwithstanding the fact that the specific performance of the positive agreement cannot be enforced under the law. So, that disposes at once of one of the grounds on which the respondent must rely.

Then, with regard to the other ground, that it is an indirect way of enforcing a covenant for personal service, that is met by Illustration (d) to section 57: that gives an instance of a case in which the plaintiffs would be entitled to an injunction—a case which is on all fours with the present case. The result is that section 57 as illustrated by Illustration (d) shows that the two grounds, which have been relied upon by the respondent, do not represent what is the law in this country, and I therefore think that there are no grounds for refusing an injunction in the present case.

Then, as regards another point, the learned Judge in his judgment expressed the opinion that, if it had been necessary to decide, he should have held that this agreement was void as being an agreement in restraint of trade (4). With very great deference to the learned Judge, speaking for myself, I should have thought that an agreement to serve Messrs. Burn & Co. in the course of their trade was not an agreement in restraint of trade, because by it the defendant stipulated that he would ply his trade, and that distinguishes the case

(1) [1898] 1 Ch. 671.

(2) [1891] 2 Ch. 416.

(3) (1852) 5 De G. & S. 485.

(4) See p. 358.

from that familiar class of cases in which an employee covenants that after the expiration of his service he will not ply his trade within some specified distance of his late employer's place of business. In the one case, he agrees to ply his trade, in the other case he specifically agrees not to ply his trade. But, whether that distinction be sound or not, it is really not necessary in the present case, because, in my opinion, illustration (d) affords the answer to the argument that this contract is void as in restraint of trade. Illustration (d), as I pointed out, deals with a case which is on all fours with the present and says that the plaintiffs are entitled in such a case to an injunction. Under those circumstances, it cannot be said that a similar stipulation in this case is void, being in restraint of trade. If so, illustration (d) would provide that an injunction could not be granted, because the agreement was void. In my opinion, illustration (d) to section 57 meets the point as to the contract being void as being in restraint of trade and that disposes of that point in favour of the plaintiffs. For these reasons I agree that this appeal should be allowed.

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BRETT J. I agree with the learned Chief Justice and have nothing to add.

Appeal allowed.

Attorneys for the appellant Company : *Orr, Dignam & Co.*

Attorneys for the respondent : *Leslie & Hinds.*

J. C.

CRIMINAL REVISION.

Before Mr. Justice Sharfuddin and Mr. Justice Coxe.

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KISHORI LAL ROY

v.

SRINATH ROY.*

Criminal Procedure Code (Act V of 1898), ss. 145, 192(2) and 529 (f)—Dispute concerning land—Jurisdiction of Magistrate—Pendency of a civil suit for possession of the disputed land—Subsistence of prohibitory order on the date of the proceeding—Transfer of case without jurisdiction—Likelihood of a breach of the peace.

The pendency of a suit under section 9 of the Specific Relief Act (I of 1877) with regard to certain land in dispute does not oust the Magistrate's jurisdiction to take proceedings under section 145 of the Criminal Procedure Code in respect of the same land, if he finds reasonable grounds for apprehending a breach of the peace.

The fact that on the date of the initiation of the proceedings under section 145 of the Code there was a subsisting order under section 144, the terms of which were not before the Court, passed against the landlords in a proceeding, to which the tenants, through whom they claimed to be in possession, were not parties, does not justify the Court in setting aside the proceedings under section 145, in respect of the same subject matter of dispute, as without jurisdiction.

A transfer by a first class Magistrate of a case under section 145 erroneously and in good faith does not vitiate the proceedings by reason of the provisions of section 529 (f).

Akbar Ali Khan v. Dami Lal (1) followed.

Section 145 requires that the Magistrate, before initiating proceedings thereunder, must be satisfied, on the materials before him, that there is fear of a breach of the peace with regard to some immoveable property between the parties.

Where the Magistrate initiated proceedings under section 145 on a police report on which he was satisfied that there was an apprehension of a breach of the peace, and there was evidence on the record of a probability of such breach of the peace, the High Court refused to set aside the final order as without jurisdiction.

* Criminal Revision No. 1092 of 1908, against the order of G. C. Banerjee, Deputy Magistrate of Dacca, dated the 28th August 1908.

(1) [(1900) 4 C. W. N. 821.]

CRIMINAL RULE.

UPON the receipt of a police report, dated the 25th February 1908, stating that there was a likelihood of a breach of the peace between Srinath Roy, the first party, and the petitioners, regarding the possession of certain *chur* land, a Deputy Magistrate of Dacca issued a prohibitory order under section 144 of the Code, on the 28th February, on both parties. Thereafter upon a fresh police report of the 12th April, F. Husain, a Deputy Magistrate of the first class, initiated proceedings, on the 23rd instant, under section 145 in respect of the same land against the parties calling upon them to file written statements of their respective claims as regards the fact of actual possession of the subject of dispute, and ultimately transferred the case for disposal to G. C. Banerjee, another first class Deputy Magistrate, who added certain other persons, as third party, and directed them also to file written statements and produce evidence. The first and third parties claimed to be in possession of the *chur* through their tenants, while the second party claimed to be in sole possession also through their tenants.

It appeared that on the 8th February, 1908, a suit under section 9 of the Specific Relief Act was instituted for the recovery of possession of the same *chur*, which was pending at the time of the present proceedings. The second party urged before the Magistrate that his jurisdiction was ousted by the suit, but the objection was overruled, and he declared the first and third parties to be entitled to possession by his order, dated the 28th August, passed after taking evidence in the case.

Mr. Garth and Babu Surendra Nath Ghosal for the petitioners.

Mr. Dunne and Babu Baikanta Nath Das for the first party.

Mr. P. L. Roy and Babu Harendra Narain Mitter for the third party.

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SHARFUDDIN AND COXE JJ. This is a Rule on the District Magistrate of Dacca and also on the opposite party to show cause why the order of Babu G. C. Banerjee, Deputy Magistrate, dated the 28th August 1908, should not be set aside on the grounds mentioned in the petition.

The first ground is that, as a suit under section 9 of the Specific Relief Act with regard to the property in dispute was pending, the Magistrate was not competent to proceed under section 145 of the Criminal Procedure Code. With regard to this point no authority has been shown to us except an unreported case. (1) But certainly in that case it is nowhere laid down that a Magistrate has no jurisdiction to proceed under section 145 with regard to properties that may be the subject of civil proceedings. Such proceedings certainly cannot take away the jurisdiction of the Magistrate to initiate proceedings under section 145, if he finds reasonable grounds for apprehending that without such proceedings a breach of the peace may be caused.

The second ground taken is that, inasmuch as on the day of the initiation of the proceedings under section 145 a subsisting prohibitory order, dated the 28th February, under section 144 of the Criminal Procedure Code, was in force against the parties, the lower Court was not competent to hold that on the 23rd April, 1908, the first party and the third party were in possession through their tenants. We find that the first and the third parties appear to have a common cause, and claim to be in possession of the *chur* in dispute through their tenants. The second party claims to be in exclusive possession of the *chur* land, also through their tenants. The prohibitory order mentioned above is not before us, and we cannot say what its terms were, but at any rate it appears that the tenants were not parties to the proceedings under section 144 of the Criminal Procedure Code. That being so, the fact that an order of some kind, the precise nature of which is not known, had been framed against the landlords, does not

(1) Criminal Revision No. 731 of 1908.

authorise us to set aside the subsequent finding that the first and third parties were in possession through tenants as without jurisdiction. Thirdly, it has been argued that Mr. F. Husain had no power to transfer cases at all, and certainly had no power to transfer cases of this nature. It is laid down in *Akbar Ali Khan v. Domi Lal* (1) that a Subordinate Magistrate cannot be empowered under section 192 (2) to transfer cases of this nature, but that case is also authority for holding that this defect is cured by section 529 (f) of the Criminal Procedure Code. Learned Counsel for the petitioner attempts to distinguish that case on the ground that in the present case Mr. Husain had no powers under section 192 at all. But we have no doubt that he has such powers. The Magistrate in his explanation states that he has them. We find from the Civil list that Mr. Husain is the Senior Magistrate with first class powers except the District Magistrate, and such Magistrates are almost invariably given these powers, and, indeed, must be given them to enable the work to be distributed when the District Magistrate is away. Finally, it seems to us wholly unlikely and opposed to experience that any Deputy Magistrate should usurp these powers. It is urged that a copy of the order authorising Mr. Husain to transfer cases ought to have been submitted, but it may well have seemed to the trying Magistrate that the above considerations are self-evident, and do not require further proof. We certainly are not prepared to assume on these materials that Mr. Husain has no power to transfer cases of any kind, and we have no doubt that he acted in entire good faith.

The last ground taken was that there is nothing to show that there was any reason for apprehending a breach of the peace between the parties, and the Magistrate, therefore, was not competent to pass the order complained against. What is required under section 145 is that the Magistrate, before initiating proceedings under that section, must be satisfied on the materials before him that there is fear of a breach of the

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(1) (1900) 4 C. W. N. 821.

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peace with regard to some immoveable property between the parties. We find that the Magistrate initiated these proceedings on a report on which he was satisfied that there was an apprehension of a breach of the peace. We also find from the explanation of the Magistrate that there is evidence on the record that there was a probability of a breach of the peace. On these findings we cannot say that the Magistrate acted without jurisdiction.

Under these circumstances, we think that all the grounds taken by the second party fail.

In conclusion we may observe that in issuing this Rule we did not attach any importance to the allegations made in the third paragraph of the petition. The Rule was granted on other grounds. The result is that the Rule is discharged.

Rule discharged.

E. H. M.

CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Ryves.

UPENDRA NATH BAGCHI

v.

EMPEROR.*

1909

January 28.

Defamation—Pleader—Improper questions in cross-examination based on wrong inference from defective memory—Privilege—Good faith—Absence of express malice—Penal Code (Act XLV of 1860), ss. 52 and 499, Exception (9).

A pleader acting upon his own recollection of the evidence given by a witness two years before, in another case in which he was a pleader, but drawing a wrong inference therefrom that the witness had been disbelieved by a particular Court, and had admitted to having been so disbelieved, and putting questions to him conveying such an imputation, after being warned that his impression was wrong, cannot, in the absence of actual malice, be convicted of defamation.

A pleader, especially in the mofussil, where instructions are very commonly inaccurate and misleading, is as much justified in acting on his own recollection as on specific instructions, and the fact that he has drawn a wrong inference does not, in the absence of actual malice, deprive him of the protection of the ninth Exception to section 499 of the Penal Code.

When a pleader is charged with defamation, in respect of words spoken or written, while performing his duty as a pleader, the Court ought to presume good faith, and not hold him criminally liable, unless there is satisfactory evidence of actual malice and unless there is cogent proof that unfair advantage was taken of his position as a pleader for an indirect purpose.

In re Nagarkhi Trikamji (1) and *Emperor v. Purshottamdas Ranchhoddas* (2) followed.

CRIMINAL RULE.

THE petitioner, a pleader of the Bhagulpur bar, was tried by the District Magistrate of Bhagulpur and convicted, on the 13th July 1908, under section 500 of the Penal Code and sentenced to a fine of Rs. 150.

On appeal the conviction and sentence were affirmed by the Sessions Judge on the 23rd September.

* Criminal Revision No. 1267 of 1908, against the order of J. C. Twidell, Sessions Judge of Bhagulpur, dated 23rd September 1908.

(1) (1894) I. L. R. 19 Bom. 340.

(2) (1907) 9 Bom. L. R. 1287.

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The District Magistrate found that there was no evidence of express malice or personal *animus* on his part, but the Judge came to no finding on the point, holding it to be unnecessary to determine it.

It appeared that in May 1908 certain proceedings under section 147 of the Criminal Procedure Code, between the Baneli Raj and the Durbhanga Raj, were pending before Karim Hossein, a Deputy Magistrate, and during the course of them Mr. Savi, the Assistant Manager of the Baneli Raj, was examined as a witness for his party. The accused, who was conducting the case for the opposite party, asked Mr. Savi the following question in cross-examination :—

Were you disbelieved by the Sessions Judge of Bhagulpur in Biranchi Singh's case ?

The pleaders on the other side objected to the question on the ground that it was based on an assumption of fact which, to their personal knowledge, was not true, and further that it was irrelevant. But the accused persisted in putting the question, alleging his own knowledge of the matter. The Court relying on this assertion admitted it, and it was answered by the witness in the negative. The accused then put the following question.

Did you not state before Mr. Hamilton in Lal Behary Singh's case that you were disbelieved by the Sessions Judge, but were believed by the High Court ?

A similar objection was taken to the question as on the first occasion, but it was allowed on the statement of the accused that he was himself a pleader in Lal Behary Singh's case for the defence and had heard Mr. Savi make the admission. This question was also answered by the witness in the negative.

On the next day Mr. Savi filed a complaint against the petitioner, under sections 500 and 504 of the Penal Code, in respect of these two questions, before the District Magistrate, and the accused filed a written statement thereafter admitting that the imputation conveyed in these questions was without any foundation, but putting forward the plea of good faith.

It further appeared that in September 1905 one Biranchi Singh, who was tried with others for dacoity in the Sessions Court of Bhagulpur, had set up an *alibi* and examined Mr. Savi in support of it. The accused was not personally connected with, or present at, the hearing of this case. The Sessions Judge, while finding no reason to doubt Mr. Savi's evidence, held that it was insufficient to establish the *alibi* and convicted Biranchi. On his appeal the High Court, accepting Mr. Savi's evidence, considered the *alibi* made out and acquitted him.

On 1st May 1906, one Lal Behary Singh was tried for rioting before the Sessions Judge of Bhagulpur, and Mr. Savi was examined to prove an *alibi* for him. The accused appeared as a pleader in the case for the accused. Syamal Das Chuckerbutty, the Government pleader, who was conducting the prosecution, asked Mr. Savi a question in regard to his evidence in Biranchi's case, which was not recorded, but the answer was: "we had a servant, Biranchi Singh, who was charged with dacoity. I gave evidence for him. He was acquitted by the High Court." The Government pleader deposed in the present case that when he put his question to Mr. Savi he wanted to show most probably that his evidence was not believed by the Sessions Judge. The petitioner asked the witness no question in re-examination in the case to clear up the point.

The Advocate-General, Mr. Sinha (Mr. P. L. Roy and Babu Sailendranath Palit with him), for the opposite party. The questions put were absolutely without foundation as Mr. Savi had not been disbelieved by the Sessions Judge in Biranchi's case. Notwithstanding that the accused was warned that the imputation was not true, he persisted in putting the questions. The privileges of the bar, while being protected, should not be abused. Did the accused act "with due care and caution" within section 52 of the Penal Code. As he took upon himself the responsibility of asking the questions on his own knowledge he must bear the consequences, if he turned out to be wrong. The question of privilege must be governed by the Penal Code

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itself and not by English law: see *Norendra Nath Sircar v. Kamalbasini Dasi* (1).

Mr. Dunne (*Mr. K. N. Chowdhry, Babu Dasarathy Sanyal, Babu Ganendranath Sarkar and Babu Suresh Chunder Mookerjee* with him), for the petitioner. The questions are not in themselves defamatory, though they may have been improper. The accused said he had knowledge of the matter. He found afterwards that the suggestion he meant to convey was incorrect, and he filed a written statement that he honestly believed at the time that he was justified in putting the questions. A man honestly believing the impression on his mind to be correct and acting on it does so in good faith. No malice is found in this case. His memory was only at fault. The position of an advocate is different from that of an ordinary person. The prosecution must prove in his case that he had not an honest belief. Refers to *Sullivan v. Norton* (2), *In re Nagarkhi Trikamji* (3) and *Isuri Prasad Singh v. Umrao Singh* (4). If a pleader acting on instructions is protected as having acted in good faith, the fact that he acted on his recollection cannot put him on a lower footing as to the question of his good faith. If he is justified in putting questions based on the memory of other persons, as he would be in the case of instructions, he cannot be prosecuted for relying on his own memory. The records of the cases of *Biranchi* and *Lal Behary* were not at the time in Court. The Court ought, where a pleader is concerned, to presume good faith, unless there is satisfactory evidence of actual malice: *Emperor v. Purshottamdas Ranchhoddas* (5).

HOLMWOOD AND RYVES JJ. Babu Upendra Nath Bagchi, a vakil of the High Court and one of the leading pleaders of the Bhagulpur Bar, was convicted by the learned District Magistrate under section 500 of the Indian Penal Code and ordered

(1) (1896) I. L. R. 23 Calc. 563.

(3) (1894) I. L. R. 19 Bom. 340.

(2) (1886) I. L. R. 10 Mad. 28.

(4) (1900) I. L. R. 22 All. 234

(5) (1907) 9 Bom. L. R. 1287.

to pay a fine of Rs. 150. The conviction and sentence were upheld on appeal by the learned Sessions Judge.

The circumstances of the case are peculiar and raise a question of very great importance. The facts of the case are practically admitted. Mr. F. A. Savi, who is the Assistant Manager of the Baneli Raj, was called as a witness in a case under section 147 of the Criminal Procedure Code, which was being contested between the Baneli Raj and the Durbhanga Raj. The appellant, who appeared as a pleader on behalf of the Durbhanga Raj, cross-examined Mr. Savi and, with the object of impeaching his credit, asked him whether the Sessions Judge had disbelieved his evidence in the case of Biranchi Singh. It appears that when the appellant put this question, the pleaders on the side of the Baneli Raj objected to it as being improper, and the Court itself only allowed the question to be put on the appellant's assertion that he knew of his own knowledge that such was the case, and that the next question that he would put would prove it. The question was then put and was answered in the negative by Mr. Savi. The next question that was put to him (and also negatived) was "Did you not state before Mr. Hamilton in Lal Behary Singh's case that you were disbelieved by the Sessions Judge, but were believed by the High Court?" To this question also objection was taken, and it was allowed to be put by the Court only on the assurance of the pleader that it was correct. The fact that this second question was pressed, has been held by the lower Courts as aggravating the offence, but it seems to us that, if he had not put it, that fact would have been some evidence against his *bona fides*. These two questions form the subject matter of the charge of defamation, of which the accused has been convicted.

In order to understand the case it is necessary to set out some further facts. Some time in September 1905 one Biranchi Singh, amongst others, was tried on a charge of dacoity before the Sessions Judge of Bhagulpur. His defence was an *alibi* and, in support of it, he called and examined Mr. Savi as a

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witness. The Court of Sessions, however, convicted Biranchi Singh holding as a matter of fact that, although there was no reason to doubt Mr. Savi's evidence, yet that evidence did not establish the *alibi*. On appeal this Court held that Mr. Savi's evidence, which had been believed by the Sessions Judge and also by this Court, did establish the *alibi*, and acquitted Biranchi Singh. The appellant, Upendra Nath Bagchi, had nothing to do with that case and apparently was entirely ignorant of what had happened in that case. This is an important feature to bear in mind.

On the 1st of May 1906, one Lal Behary Singh was tried for rioting by Mr. Hamilton, the then Sessions Judge of Bhagalpur, and in that case also Mr. Savi was called as a witness for the defence and deposed to an *alibi* set up by the accused. In this case the appellant appeared as the pleader for the accused, so that Mr. Savi was his own witness. The Government pleader in cross-examining Mr. Savi put certain questions to him, obviously with the intention of shaking his credit. The Government pleader has been examined in this case and so also has Mr. Savi, but, after the lapse of over two years, it is not unnatural that neither of them can recollect the exact form of the questions. But from the way in which the answers have been recorded, we do not think there can be much substantial doubt as to what the question or questions were. The record runs "we had a servant, Biranchi Singh, who was charged with dacoity. I gave evidence for him. He was acquitted by the High Court." We think the Government pleader probably asked him whether the Sessions Judge disbelieved the *alibi* set up by Biranchi Singh in that case, which *alibi* was supported by Mr. Savi's evidence. What the Government pleader himself says is "when I put the question to Mr. Savi, in regard to which his statement is recorded, I wanted to show, most probably, that his evidence was not believed by the Sessions Judge." Now how came the Government pleader to put this question? He is a very experienced practitioner, and has been Government pleader for over 13 years. He admits that

he had not read the Sessions Judge's judgment in Biranchi Singh's case, and he also admits that, if he had read it, he could not have put the question, and this is obvious, because he would then have realized that the question would have been as useless as it was improper. He did, however, put the question. We do not think he had instructions to put the question. He says "I myself knew of the case of Biranchi Singh and needed very little instruction." As he had not read the judgment of the Sessions Judge his personal knowledge or recollection can only have amounted to this, namely, that Mr. Savi had sworn in support of Biranchi Singh's *alibi*, and that, inspite of this, the Sessions Judge convicted Biranchi Singh. Is it not very likely that, putting these two circumstances together, the Government pleader himself fell into a similar error as the appellant, and drew the wrong inference that the Sessions Judge had disbelieved Mr. Savi, and was thereby induced to cross-examine Mr. Savi on the point? Mr. Savi's answer appears at the very end of a rather long cross-examination, and we think that, if the appellant, who is described as an experienced and acute pleader, had known the real facts of Biranchi Singh's case, he would certainly in re-examination have cleared up the matter by asking Mr. Savi (his own witness) if he had not, as a matter of fact, been believed even by the Sessions Judge. On the other hand if, as a matter of fact, as it appears, he knew nothing beforehand of Biranchi Singh's case, it is possible that the inference, which the appellant drew at the time from the way in which the answer is recorded, was that Mr. Savi admitted, or at least left it open to implication, that as a fact he had been disbelieved by the Sessions Judge, but that his veracity had been established by the High Court. If this was the inference, which he drew at the time, he might well have thought it quite unnecessary to re-examine him on the point, thinking that it was enough that the High Court had believed his witness.

In the petition of complaint in this case it is stated that the appellant put the questions intending to harm and injure

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the complainant's reputation, and that the complainant had reason to believe that the appellant was dissatisfied and annoyed with the master of the Baneli Raj and with the complainant, and put the questions maliciously knowing that he was making a false and untrue allegation and insinuation in order to satisfy his personal grudge. In the course of his exhaustive and very able judgment the learned District Magistrate, Mr. Lyall, has distinctly found that there is no evidence to prove express malice on the part of the accused nor any reason to believe that he had any personal motive or *animus* against Mr. Savi. He goes on to say, however, quoting from Collet, that malice is of two kinds, malice in law and malice in fact : malice in law is where a wrongful act (*e.g.*, the defamation of another) is done without just cause or excuse. He then goes on to consider whether the appellant, when he put the questions, had just cause or excuse. He finds that he was not instructed to put the questions, and he also finds that he had no right to rely implicitly on his recollection of what Mr. Savi had said in Lal Behary Singh's case and, in short, that in any case he should certainly not have drawn the inference which, he says, he drew, because it was not the only or true inference which he could have drawn, and that, therefore, he acted without just cause or excuse.

The learned Sessions Judge has come to no finding on the question of express malice, holding that it was unnecessary to decide the point. To us it seems a matter of very great importance, and we have no hesitation in coming to the conclusion arrived at by Mr. Lyall. We do not think that the appellant had the slightest personal motive in the matter. We believe that he was acting entirely in the interests of his client, and the only question, which we have to decide, is whether, on the facts of this case, the appellant is or is not protected by the ninth Exception to section 499. We are entirely of opinion that he is. The learned District Magistrate seems to be of opinion that the appellant should not have put the first question merely relying on his memory without first perusing the

records of the case to verify his recollection, and, more especially, should not have relied on his memory when the pleaders on the other side warned him that he was mistaken. But the records of the case were not in the Court, and we certainly do not think that the Court would or should have adjourned the taking of the further evidence of Mr. Savi to enable the appellant to examine a record deposited in some other Court. It seems to us that it would be very dangerous to tie the hands of Counsel in this way. We find on examination that, in fact, the appellant's memory of the incident was substantially accurate. The mistake he made was in the inference he drew from what he remembered to be Mr. Savi's answer. But this inference was a possible one, although not, of course, the necessary inference to be drawn, and we think that, if the accused, rightly or wrongly, did draw this inference, he was bound, in the interests of his client, to rely on his own recollection. It seems to us, especially in the mofussil of this country, where instructions, to the personal knowledge of one of us, are very commonly inaccurate and misleading, that a pleader would certainly be at least as much justified in acting on his own recollection as on specific instructions, and we do not think that, because he has drawn merely a wrong inference from a fact, that of itself, in the absence of any malice, should take him out of the ninth Exception to section 499. We agree with the remarks of Jardine and Farran JJ. in *In re Nagarji Trikamji* (1), which were recently referred to with approval by Chandavarkar and Knight JJ. in *Emperor v. Purshottamdas Ranchhoddas* (2), namely, "when a pleader is charged with defamation in respect of words spoken or written, while performing his duty as a pleader, the Court ought to presume good faith and not hold him criminally liable, unless there is satisfactory evidence of actual malice and unless there is cogent proof that unfair advantage was taken of his position as pleader for an indirect purpose." In this case, as we have pointed out, there is no evidence of any express malice, and the

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(1) (1894) I. L. R. 19 Bom. 340.

(2) (1907) 9 Bom. L. R. 1287.

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alleged unfair advantage taken of his position, without due care and attention, turns out to be at most a very natural, though, as it happens, a wrong inference evidently made at the time Mr. Savi was examined in Lal Behary's case, and used in apparent good faith in the later case, entirely in the interest of his client and not for his own ends.

For these reasons we make the Rule absolute, and direct that the conviction be set aside and the fine, if paid, refunded.

Rule absolute.

E. H. M.

CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Ryves.

RAMTOHAL DUSADH

v.

EMPEROR.*

1909

January 14.

Appeal, admission of—Hearing on date of filing—Pleader—Right to be heard—Practice in the mofussil—Criminal Procedure Code (Act V of 1893), s. 421.

A pleader for an appellant should not be called upon, immediately on the filing of an appeal, to support it, but should be afforded a reasonable opportunity of being heard.

If the appeal is not admitted at once, and the Court desires to hear the appellant, before admitting it under section 421 of the Criminal Procedure Code, he should be given the same notice, as is given to the Crown.

Semle, the practice in the mofussil is to admit appeals, which are supported by pleaders, without any hearing, except on a question of bail; the only cases, which are dealt with under section 421 of the Code, being jail appeals.

CRIMINAL RULE.

THE accused was tried and sentenced, on the 3rd November 1908, to nine months' rigorous imprisonment, for theft of the complainant's cattle, by the Sub-divisional Magistrate of Dinapore. He appealed to the Sessions Judge of Patna, who called upon the pleader, who presented the appeal, to argue it on the same day. The pleader was not prepared to do so, and the appeal was summarily rejected under section 421 of the Code without his being heard.

The accused then obtained the present Rule to set aside the order of the Judge on the ground that his pleader had not been given a reasonable opportunity of being heard.

Mr. Dunne (Babu Gonesh Dutt Singh with him) for the petitioner. The Judge called upon the pleader for the appellant to proceed with the case on the date on which the petition of appeal was presented for admission. He had no reasonable

* Criminal Revision No. 1303 of 1908, against the order of F. M. Luca, Sub-divisional Magistrate of Dinapore, dated the 3rd November 1908.

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opportunity given him of preparing himself for argument. A pleader may have read his brief and drawn up the grounds of appeal, but he is not always ready upon that to argue the case on the merits. It is the practice in the mofussil to allow time after the filing of an appeal.

The Deputy Legal Remembrancer (Mr. Orr.) for the Crown. The pleader did not inform the Judge that he was unprepared to argue the case.

HOLMWOOD AND RYVES JJ. This was a Rule calling upon the District Magistrate of Patna to show cause, why the order of the Sessions Judge summarily rejecting the appeal in this case should not be set aside on the ground that the vakil, who filed it, had not a reasonable opportunity of being heard in support of the same, inasmuch as he was not prepared to argue on the day the petition was presented.

We observe that the Sessions Judge of Patna had addressed a letter to the District Magistrate on the subject, and this has been forwarded to us apparently without a covering letter. This is irregular. No Explanation has been called for from the Sessions Judge, and he himself notes that the Rule was not issued on the ground that his Court did not exercise its discretion wisely. The real question in the case is whether the appellant had a reasonable opportunity of being heard in support of his appeal.

Now it appears to us, and it is in accordance with the experience of both of us in two different provinces, as regards the practice in the mofussil, that appeals, which are supported by a pleader, are in practice admitted without any hearing except on the question of bail; the only cases, which are usually dealt with under section 421 of the Criminal Procedure Code, being jail appeals. The practice in this Court is to hear every appeal under section 421, but in this Court the parties have ample notice. Every case is fully argued on its merits with due time and consideration. Here, the very moment that a petition was filed, the pleader was called upon to support the appeal on any

or all of the grounds upon which it was laid. We do not think that this is a reasonable opportunity of being heard. Had it been necessary to call upon the Crown, according to the universal practice, the Crown would have had a week's notice, and we think the appellants should also have the same notice, if the Court desires to hear them under section 421 before admitting the appeal.

We, therefore, make the Rule absolute, and direct that the pleader should have a further opportunity of being heard after due notice to the appellants.

Rule absolute.

E. H. M.

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ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

1909

December 17.

CHOONI LAL

v.

MADHORAM AND OTHERS.*

Arbitration—Bengal Chamber of Commerce, arbitration by—Rules—Umpire, appointment of—Effect of failure to appoint.

The rules relating to arbitration under the Bengal Chamber of Commerce contemplate the appointment of an Umpire before the Arbitrators enter upon the reference, and not upon a disagreement between them.

Where the terms of a reference provide for the appointment of an Umpire before the arbitrators enter upon the reference, until the Umpire is appointed, the reference cannot proceed.

Bright v. Durnell (1), *Bates v. Townley* (2) followed.

MOTION.

THIS was an application made by the petitioner Chooni Lal under section 11, sub-section (2) of the Indian Arbitration Act for an order that an award made by the Bengal Chamber of Commerce be filed and a decree made thereon. The motion came on for hearing on the 11th November 1908, and the respondent in opposing the application relied on the case of *Hurdwary Mull v. Ahmed Musaji Selaji* (3), and judgment was reserved.

Thereafter, on the 25th November, under the direction of the Court the matter was further argued upon the question of the appointment of an Umpire.

Mr. C. C. Ghose for the applicant Chooni Lal. The rules of the Bengal Chamber of Commerce contemplate the appointment of an Umpire only when the Arbitrators disagree. This is clearly shown by reference to Rule VI. In this case, however, the Arbitrators have not disagreed at all and therefore the question of appointing an Umpire does not arise.

* Original Civil Suit No. 668 of 1908.

(1) (1836) 4 Dow. 756.

(2) (1847) 1 Ex. 572.

(3) (1908) 13 C. W. N. 63.

Mr. P. L. Buckland for the respondent. The appointment of an Umpire by the Registrar is a condition precedent to the Arbitrators entering on a reference, and until such appointment is made the tribunal to be constituted under the Rules of the Chamber for determining the dispute cannot be properly constituted.

The words in Rule VI show that not only must the Arbitrators and Umpire be appointed on receipt of an application, but their consent must be obtained before the arbitration is conducted. The proceedings in this case have all along been irregular and the contention raised by the other side is fully met by the following English cases. *Bright v. Durnell* (1) and *Bates v. Townley* (2).

Cur. adv. vult.

FLETCHER J. This is an application by the petitioner for an order that an award made by the Bengal Chamber of Commerce may be filed in Court and that a decree be passed thereon for judgment in accordance with the terms of the award. Upon the matter first coming on before me the application was opposed by the respondents on the same grounds as those raised in *Hurdwary's case* (3) with this important exception that it was not suggested in this case that the Arbitrators had allowed the time for making the award to expire before making their award.

In these circumstances I had to consider whether I ought not to remit this case to the Arbitrators.

On a more careful study of the Arbitration Rules of the Chamber of Commerce, however, it occurred to me that it was open to doubt whether the arbitral tribunal contemplated by the Rules of the Chamber of Commerce had ever been duly constituted on the ground that the Registrar had failed to appoint an Umpire. Accordingly, I set this matter down to be re-argued.

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FLETCHER J.

(1) (1836) 4 Dow. 756.

(2) (1847) 1 Ex. 572.

(3) (1908) 13 C. W. N. 63.

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Upon the matter coming on before me for re-hearing, it was argued by the learned Counsel on behalf of the applicant that the rules only contemplated the appointment of an Umpire by the Registrar, if and when the Arbitrators disagreed. The learned Counsel for the respondents, on the other hand, argued that the appointment of an Umpire by the Registrar was a condition precedent to the Arbitrators entering on the reference and that, unless an Umpire was appointed by the Registrar, the arbitral tribunal to be constituted under the Rules of the Chamber for determining the dispute could not be properly constituted. It is common ground that no Umpire was in fact appointed. Now Rule VI of the Arbitration Rules is the rule that governs the appointment of Arbitrators and Umpires. Such rule is in the following terms :—

"That in every case where a dispute has arisen in relation to a contract, which provides for a decision thereof by the Tribunal, an application shall be addressed by either party to the Registrar, who *on receipt of such application* shall constitute a Court by nominating in writing two or more Arbitrators and also in case of need an Umpire or if both parties in and by such application so desire a single Arbitrator to adjudicate on the dispute. The consent of the Arbitrators to act shall be obtained by the Registrar and the arbitration shall then be conducted in accordance with the following rules."

It has been contended by Mr. C. C. Ghose that, although upon the ordinary and grammatical reading of Rule VI the words "on the receipt of such application" govern the whole of the sentence "shall constitute a Court by nominating in writing two or more Arbitrators and also in case of need an Umpire or, if both parties in and by such application so desire, a single Arbitrator to adjudicate on the dispute," yet taking the rules as a whole the appointment of an Umpire is not contemplated, unless and until the arbitrators have failed to agree.

On the other hand, it has been argued by Mr. Buckland on behalf of the respondent that the words in Rule VI must bear their ordinary and natural meaning, and further that the words in Rule VI: "The consent of the Arbitrators to act shall

be obtained by the Registrar and the arbitration shall then be conducted in accordance with the following rules" show that not only must the Arbitrators and Umpire be appointed on receipt of the application, but the consent of both the Arbitrators and Umpire to act must be obtained before "the arbitration is conducted" for by Rule 1 (5) the expression "the Arbitrators" includes (unless clearly precluded by the context) the Umpire.

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In my opinion the argument of Mr. Buckland is well-founded. I think that the subsequent rules clearly show that the rules do not contemplate the Umpire being appointed on the disagreement of the Arbitrators, but on the other hand contemplate the Umpire being appointed before the Arbitrators enter upon the reference.

This, I think, is sufficiently shown by Rule VI (m), which is in the following terms :—"If the Arbitrators have allowed the time or extended time to expire without making any award or have signified to the Registrar or to the Umpire that they cannot agree, the Umpire may forthwith enter upon the reference."

How can the Arbitrators signify to the Umpire that they cannot agree and how can the Umpire forthwith enter upon the reference, if the Umpire is not to be appointed, until the Arbitrators disagree ?

I see therefore no reason why the words in the first part of Rule VI should not bear their ordinary meaning and I therefore hold that upon such application as is mentioned in Rule VI it is incumbent on the Registrar, when he appoints two or more Arbitrators, to appoint also "in case of need" an Umpire.

What then do the words "in case of need" mean ?

From a careful study of the Rules I think that the words "in case of need" are meant to apply to cases where the failure of the Registrar to appoint an Umpire might, if the Arbitrators disagree, render the proceedings abortive.

Rule IX provides : "In cases where a Court of the Tribunal shall consist of a plurality, the decision of the majority shall be deemed and taken as the decision of the Court."

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Thus in the case of the Registrar appointing three Arbitrators under Rule VI, the rules do not contemplate that being a "case of need" in which an Umpire need be appointed, because Rule IX provides that the decision of the majority shall be taken as the decision of the Court. But in cases where two Arbitrators are appointed, Rule IX cannot apply as there can be no majority and this is, I think, at any rate a "case of need" contemplated by Rule VI.

But then it has been argued on behalf of the applicant that even if the Rules (being the terms of the reference) do provide for the appointment of an Umpire on the receipt of the application for arbitration by the Registrar, yet, as the Arbitrators did not disagree, the failure by the Registrar to appoint an Umpire does not vitiate the proceedings. This point however, in my opinion, is concluded by the authority of two cases, both being the decisions of the Full Court of Exchequer, one being the case of *Bright v. Durnell* (1) and the other being the case of *Bates v. Townley* (2).

In the case of *Bright v. Durnell* (1) the terms of the reference provided that the dispute "was to be referred to the arbitration of two persons, one to be chosen by each, who were to appoint an Umpire before they commenced proceedings."

The Arbitrators not being able to agree on the appointment of an Umpire one of the parties to the reference commenced proceedings in Court against the other party. The other party obtained a rule *nisi* calling on the party, who had instituted the proceedings, to show cause why the proceedings should not be stayed as the parties had agreed to refer the dispute to arbitration. The Court discharged the rule and Parke B in giving his judgment made the following pertinent remarks:—

"If the Umpire is not appointed how can we compel the Arbitrators to appoint one? And, until he is appointed, the reference cannot go on. It appears to me to be a condition precedent that an Umpire be appointed."

It is obvious that it can make no difference whether the Umpire is to be appointed by the Arbitrators or by a third

(1) (1836) 4 Dow. 756.

(2) (1847) 1 Ex. 572.

party. If the terms of the reference provided that the Umpire is to be appointed, before the Arbitrators enter upon the reference, the reference cannot go until the Umpire is appointed.

As I have already said I hold that it is incumbent on the Registrar when he appoints two Arbitrators on the receipt of an application for arbitration under Rule VI, to appoint also an Umpire.

This application therefore fails and must be dismissed with costs.

Attorney for the applicant: *S. S. Bonnerjee.*

Attorneys for the respondent: *Leslie & Hinds.*

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CIVIL RULE.

Before Mr. Justice Sharfuddin and Mr. Justice Cox.

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Feb. 4

GIRINDRA MOHAN ROY

v.

KHIR NARAYAN DAS.*

Waiver—Instalment bond—Default in payment of instalments—Limitation—Limitation Act (XV of 1877), s. 9, Sch. II, Art. 75—Cause of action—Disability or inability.

In an unregistered instalment bond there was a stipulation that in the event of default in payment of two consecutive instalments the creditor would be entitled to recover the whole amount covered by the bond, which was payable in twelve instalments. The second instalment was due on the 12th June, 1899.

The plaintiff brought a suit on the 1st June, 1908, for recovery of the instalments due on the bond, relinquishing the first two instalments:—

Held, that mere abstinence on the part of the plaintiff from bringing a suit for recovery of the whole amount due, on the failure of payment of the first two instalments, did not amount to waiver; and that limitation began to run from the 12th June 1899, when the cause of action arose. No subsequent disability or inability could arrest the running of limitation, under s. 9 of the Limitation Act.

Hurronauth Roy v. Maheroollah Mollah (1) and *Mon Mohun Roy v. Doorga Churn Goose* (2) followed.

CIVIL RULE.

RULE granted to the plaintiff, Girindra Mohan Roy, a minor, by his next friend Satish Chandra Chowdhry, Manager under the Court of Wards, petitioner.

The plaintiff brought a suit for recovery of the amount due on an unregistered instalment bond executed by the defendant in the names of the adoptive mother and the step-mother of the plaintiff before his adoption. The whole amount of the bond was payable in twelve instalments, and there was a stipulation in the bond that in the event of default in payment

* Civil Rule No. 3319 of 1908, against the judgment of Ali Ahmad, Small Cause Court Judge of Rungpur, dated Aug. 14, 1908.

(1) (1887) 7 W. R. 21.

(2) (1888) I. L. R. 15 Calc. 502.

of two consecutive instalments the creditor would be entitled to recover the entire amount due on the bond. The first instalment was payable on the 30th Falgoun 1305 B. S., and the second on the 30th Joista 1306 B. S. (12th June 1899).

The plaintiff was adopted on the 2nd of July 1899, and thereupon he succeeded to the estate of his adoptive father, together with the aforesaid instalment bond.

The defendant failed to pay the instalments, and the suit was brought on the 1st June 1908 for recovery of the instalments due on the bond, relinquishing the first two instalments, which had become due before his adoption.

The defendant contended that as the cause of action to recover the whole amount arose on the 12th June 1899 (the date on which the second instalment fell due) the suit was barred by limitation.

The Court below dismissed the suit on the ground that it was barred by limitation.

The plaintiff, thereupon, moved the High Court and obtained this Rule.

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*The Advocate-General (Hon'ble Mr. S. P. Sinha) (Babu Umakali Mookerjee and Babu Debendra Nath Bagchi with him), for the petitioner. It is optional with the creditor, under the bond, to sue or not for the whole amount on the first default. The plaintiff brought the suit relinquishing his claim for the first two instalments which, I submit, amounted to a waiver under Article 75, Schedule II of the Limitation Act: *Rup Narain Bhattacharya v. Gopi Nath Mandol* (1). The first two instalments became due before the plaintiff's adoption, and he, being still a minor, the cause of action arose during his minority, and his present claim is, therefore, saved from limitation.*

Babu Hem Chandra Mitra (Babu Atul Chandra Dutt with him), for the opposite party. There is no distinction between an optional and compulsory institution of suit. A mere

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abstinence from suing, or mere payment and receipt of overdue instalments do not amount to a waiver: *Balaji Ganesh v. Sakharam Parashram Angal* (1), *Mumford v. Peal* (2). To constitute a waiver there must be payment and circumstances clearly indicating an intention to waive. The limitation runs, in this case, from the time when default was made in payment of the second instalment in consequence of which the whole amount became due: the claim is therefore barred by limitation. Reliance was placed on the following cases:—*Hurronauth Roy v. Maheroollah Moollah* (3), *Nobodip Chunder Shaha v. Ram Krishna Roy Chowdhry* (4), *Mon Mohun Roy v. Doorga Churn Gooee* (5), *Hurri Pershad Chowdhry v. Nasib Singh* (6), *Sitab Chand Nahar v. Hyder Malla* (7), *Jadab Chandra Bakshi v. Bhairab Chandra Chuckerbutty* (8), *Nagappa v. Ismail* (9), *Hemp v. Garland* (10), *Chenibash Shaha v. Kadum Mandul* (11).

Babu Debendra Nath Bagchi, in reply, referred to *Badi Bibi Sahibal v. Sami Pillai* (12), and also to *Chunder Komal Das v. Bisassurree Dassia* (13), *Nobocoomar Mookhopadhyaya v. Siru Mullick* (14), *Ganesh Krishn v. Madhavrav Ravji* (15) and *Nilmadhub Chuckerbutty v. Ramsodoy Ghose* (16), on which the case of *Rup Narain Bhattacharya v. Gopi Nath Mandol* (17) was based.

Cur. adv. vult.

SHARFUDDIN AND COXE JJ. This is a Rule granted to the petitioner under section 25 of the Provincial Small Cause Court Act.

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| (1) (1892) I. L. R. 17 Bom. 555. | (9) (1889) I. L. R. 12 Mad. 192. |
| (2) (1880) I. L. R. 2 All. 857. | (10) (1843) 4 Q. B. 519. |
| (3) (1867) 7 W. R. 21. | (11) (1879) I. L. R. 5 Calc. 97. |
| (4) (1887) I. L. R. 14 Calc. 397. | (12) (1892) I. L. R. 18 Mad. 257. |
| (5) (1888) I. L. R. 15 Calc. 502. | (13) (1883) 13 C. L. R. 243. |
| (6) (1894) I. L. R. 21 Calc. 542. | (14) (1880) I. L. R. 6 Calc. 94. |
| (7) (1896) I. L. R. 24 Calc. 281. | (15) (1881) I. L. R. 6 Bom. 75. |
| (8) (1904) I. L. R. 31 Calc. 297. | (16) (1883) I. L. R. 9 Calc. 857. |
| (17) (1906) 11 C. W. N. 903. | |

The facts giving rise to the present Rule are that the petitioner was adopted on the 2nd of July, 1899 (18th of Sravan 1306). His adoptive mother and step-mother were in temporary possession of the estate as Hindu widows with limited rights, which ceased on the date of the petitioner's adoption.

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Along with the estate to which the petitioner succeeded on his adoption there was also an instalment bond executed by the defendant in favour of the two ladies mentioned above.

The instalment bond above referred to stipulated for payment of the money covered by it in twelve instalments, falling due on the dates mentioned in the bond, the second instalment falling due on the 30th Jaista 1306. There was a further stipulation in the bond to the effect that in the event of default in payment of two consecutive instalments, the creditor would be at liberty to recover the entire amount due on the bond.

It appears that the petitioner was a minor when adopted, and is still a minor. It further appears that the defendants have failed to pay any instalment of the bond.

30th Jaista 1306 (12th June 1899) was the date on which the 2nd instalment was due, and under the stipulation in the bond, the cause of action arose on that date as the defendants had failed to pay two consecutive instalments. The adoption of the petitioner took place, as observed before, on the 2nd of July 1899, i.e., within three weeks of the date when the cause of action arose. This instalment bond is an unregistered document, and, if the cause of action arose on the 12th, June 1899, it was contended that, the suit having been brought on the 1st of June 1908, was barred by the Statute of Limitation.

The lower Court has dismissed the suit holding that the plaintiff's case is barred by Limitation, and the plaintiff has obtained the present Rule from this Court.

It is contended that the Article of the Limitation Act, that governs the present case, is Article 75, Schedule II, Act XV of 1877. The limitation therein provided is three years from the date when the first default is made, unless the payee or obligee

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waives the benefit of the stipulation to sue for the whole amount of the bond, and then from the date when the fresh default is made in respect of which there is no such waiver.

It is contended on behalf of the petitioner that the suit was brought after distinctly waiving his claim for the first two instalments, which had fallen due before his adoption and that hence the "cause of action" arose during his minority and his claim was, therefore, saved from limitation.

Under section 9 of the Limitation Act (XV of 1877) "when once time has begun to run no subsequent disability or inability to sue stops it." If the limitation began to run from 12th June, 1899, the due date of the second instalment under section 9 of the Limitation Act, the petitioner's adoption some three weeks after that date could not arrest the limitation, which had already commenced to run, unless the right to sue on two consecutive instalments falling due was waived. The whole question therefore hinges on the question of waiver.

A number of authorities has been referred to by the parties in support of their respective contentions.

There is no allegation in the present case that there was any acceptance on the part of the plaintiff of the overdue instalments.

It is contended on his behalf that his relinquishment of his claim for the first two instalments amounts to a waiver as contemplated by Article 75, Schedule II of the Limitation Act (XV of 1877), and in support of his contention our attention has been drawn to various authorities, of which the most recent is the case of *Rup Narain Bhattacharya v. Gopi Nath Mandol* (1), where it was decided, that the proviso in the bond having been inserted for the advantage of the creditor, it was open to him, if default were made, to sue at once for the whole amount, or if he so elected, to waive the benefit of the proviso, which was thus conferred upon him. In that suit no claim was made for the first instalment on the non-payment of which the benefit of the

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proviso was conferred upon the plaintiff. We further find in this reported case the following observation :—" The question therefore is, whether the suit is barred altogether or whether the plaintiff waiving, as he has done, the benefit of the proviso, to which I have referred, is not entitled to the instalments, which have accrued due within the limit of six years from the date of suit." This suit was upon a registered instalment bond. The authorities relied upon in this case were *Chunder Komal Das v. Bisassurree Dassia* (1), *Nobocoomar Mookhopadhyaya v. Siru Mullick* (2), *Ganesh Krishn v. Madhavrav Ravji* (3), and *Nil-madhub Chuckerbutty v. Ramsodoy Ghose* (4). It is not clearly stated in this judgment whether abstinence from bringing the suit for the whole claim was considered as in itself a sufficient waiver in law, and the only fact stated is that the suit was not for the over-due instalment. It is stated that the plaintiff had waived the benefit of the proviso, but it is not clear how he waived it.

In the case of *Chunder Komal Das v. Bisassurree Dassia* (1), it was held that an application for the execution of an instalment decree was not barred except as to the instalments, which had fallen due more than three years before, and that it was optional with the decree-holder to realize the whole decree at once upon default being made or to waive his right to do so and seek to realize instalments as they became due. This was so held following *Asmutullah Dalal v. Kally Churn Mitter* (5), which was also followed in the case of *Nil Madhub Chuckerbutty v. Ramsodoy Ghose* (4). We find in the last-mentioned case that the decision hinged on the construction of the decree. The wording of that decree is not given in the judgment, but is said to have been obscure.

The cases of *Nobocoomar Mookhopadhyaya v. Siru Mullick* (2) and *Ganesh Krishn v. Madhavrav Ravji* (3) have no application to the present case.

(1) (1883) 13 C. L. R. 243.

(3) (1881) I. L. R. 6 Bom. 75.

(2) (1880) I. L. R. 6 Calc. 94.

(4) (1883) I. L. R. 9 Calc. 857

(5) (1881) I. L. R. 7 Calc. 56.

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In the case of *Nilmadhub Chuckerbutty v. Ramsodoy Ghose* (1), the execution was allowed to proceed on the ground that the judgment-debtor had paid up the over-due instalment, which was accepted by the decree-holder, and hence it was held that limitation began to run in this case from the time when the judgment-debtor stopped making any payment.

On behalf of the respondent, on the other hand, a number of authorities have been placed before us in support of his contention that the suit was barred by limitation. We propose to take up and discuss these authorities one by one.

In *Chenibash Shaha v. Kadam Mundul* (2), it was held that, when a debt is made payable by instalments with the proviso that on default of payment of any one instalment, the whole or so much as may then remain unpaid will become due, limitation runs from the time of the first default. A subsequent acceptance of the instalment in arrear operates as a waiver and suspends the operation of the law of Limitation: but merely allowing the default to pass unnoticed does not. The word waiver in this authority has been explained to mean that, where the whole amount secured by the instalments becomes payable on default of payment of the first instalment and the payee, instead of taking measures to recover the whole amount, accepts payment of the instalment in default, he must wait till there is a fresh default in the matter of the recovery of the remainder. It was further remarked in this case that the non-receipt of the particular instalment or suffering it to fall through by operation of the Statute of Limitation is not a waiver as, if this were so, waiver and *laches* would be convertible terms and the object of the law of Limitation would be frustrated.

In *Nobodip Chunder Shaha v. Ram Krishna Roy Chowdhry* (3), it was held that the mere fact that a creditor had done nothing to enforce the condition in an instrument under which the whole debt became due on failure of payment of one

(1) (1883) I. L. R. 9 Calc. 857.

(2) (1879) I. L. R. 5 Calc. 97.

(3) (1887) I. L. R. 14 Calc. 397.

instalment, is no evidence of waiver within the meaning of the Limitation Act. In this case the instalments had been unpaid for sometime and, as a matter of fact, the time that the last payment was made was so long ago that, if the whole amount became due at that time, the cause of action was barred, and upon that state of things the question that arose was whether the mere fact that the creditor had done nothing, but simply allowed the matter to sleep without enforcing his remedy against the debtor, was any evidence of waiver within the meaning of the Limitation law. It was held that such a condition of things would be no evidence of waiver.

In *Monmohun Roy v. Doorga Churn Goode* (1), it was held that, where a decree or order makes a sum of money payable by instalments on certain dates and provides that, in default of payment of any instalment the whole of the money shall become due and payable and recoverable in execution, limitation begins to run from the date of the first default, unless the right to enforce payment has been waived by subsequent payment of the over-due instalment on the one hand and receipt on the other. It was held that the application was barred by limitation. The learned Judges, who decided this case, followed a decision of the Full Bench in the case of *Hurro-nauth Roy v. Maheroollah Moollah* (2), where it was held that limitation ran from the time when default was made in the payment of the first instalment in consequence of which the whole amount became due. The decision of the Full Bench was upon a reference made by the Judge of the Small Cause Court at Kushtea. The above decision of the Full Bench is supported by an English case, viz., *Hemp v. Garland* (3). In this English case it was held that, when a note payable by instalments contains a provision that, if default be made in payment of one instalment, the whole shall be due, the cause of action arises upon the first default for all that then remained

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(1) (1888) I. L. R. 15 Calc. 502.

(2) (1867) 7 W. R. 21.

(3) (1843) 4 Q. B. 519.

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owing of the whole debt, and limitation has to be computed from the date of such default.

In *Hurri Pershad Chowdhry v. Nasib Singh* (1), it was held that a clause in the decree to the effect that on non-payment of an instalment by the specified date it should be in the power of the decree-holder to realize the whole amount was not intended to give him the option of waiving the default, if he pleased, but that it implied nothing more than the usual condition that on non-payment of an instalment the whole decretal amount becomes exigible. It was further held that, as the first instalment had not been paid on the due date, the application for execution not having been made within three years from the date when the whole amount became due was barred by limitation. It was also held in this case that mere abstinence from suing cannot amount to a waiver.

Sitab Chand Nahar v. Hyder Mallah (2) was a case of a mortgage-bond executed by the defendants whereby a sum of money was made payable by four instalments and the plaintiff was given the liberty in case of any default to sue either for the amount of that instalment or for the whole amount then due; it was held that limitation ran from the date of the first default. In this case it was remarked that, where there is an optional right given to enforce payment of money, such right may be waived, but when it is not waived or where there is nothing to show that it has been waived, limitation would run from the date when the right accrues. The learned Judges, who decided this case, relied upon certain observations of Lord Denman, Chief Justice, in *Hemp v. Garland* (3) referred to above—the observations being .—“That if he (plaintiff) chose to wait till all the instalments become due no doubt he might do so; but that which was optional on the part of the plaintiff would affect the right of the defendant, who might well consider the action as accruing from the time the plaintiff had a right to maintain it.” The learned Judges, who decided this case, further remarked

(1) (1894) I. L. R. 21 Calc. 542.

(2) (1896) I. L. R. 24 Calc. 281.

(3) (1843) 4 Q. B. 519.

that the money sued for became due according to the terms of the bond when the first default in the payment of an instalment was made and it became due none the less because the right to enforce immediate payment was optional with the creditor.

Jadab Chandra Bakshi v. Bhairab Chandra Chuckerbatty (1) was a case of an instalment-bond wherein it was stipulated that on default being made in payment of any one instalment, the creditor would be at liberty to realize the amount covered by all the instalments. It was held that in such a case limitation would run from the date of the first default, unless there was a waiver by the creditor of the right to demand the whole on a default by subsequent acceptance of an over-due instalment. The learned Judges, who decided this case, dissented from the decision in the case of *Chunder Komal Das v. Bisassurree Dassie* (2), and followed the decision in the case of *Hurri Pershad Chowdhry v. Nasib Singh* (3).

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The preponderance of the authorities supported by the decision of the Full Bench quoted above is to the effect that in the case of instalment bonds with the stipulation of the whole debt becoming due on the failure of payment of a certain instalment limitation would begin to run from the date of the non-payment of that instalment, unless there has been a waiver by the decree-holder by the acceptance of the over-due instalment.

In view of the conflicting rulings on the subject of waiver, we feel bound to follow the decision of the Full Bench in the case of *Hurronauth Roy v. Maheroollah Moollah* (4). It is true that that case was decided under Act XIV of 1859, in which there was no provision corresponding to Article 75. But it was followed in *Monmohan Roy v. Doorga Churn Goodee* (5) in 1888, and the principle it embodies, in our opinion, is still the law.

We hold that mere abstinence on the part of the plaintiff in this case from bringing a suit for the recovery of the whole

(1) (1904) I. L. R. 31 Calc. 297.

(3) (1894) I. L. R. 21 Calc. 542.

(2) (1883) 13 C. L. R. 243.

(4) (1867) 7 W. R. 21.

(5) (1888) I. L. R. 15 Calc. 502.

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amount due on the failure of the payment of the first two instalments did not amount to waiver. The cause of action arose on the 12th June 1899 and limitation began to run from that date. Under section 9 of the Limitation Act, no subsequent disability or inability could arrest the running of limitation.

In the above circumstances, we think that the judgment of the Small Cause Court is correct, and we therefore discharge the present Rule.

Rule discharged.

S. D. B.

APPELLATE CRIMINAL.

Before Mr. Justice Holmwood and Mr. Justice Ryves.

GIRIJA SUNDAR CHUCKERBUTTY

v.

EMPEROR.*

1908
Dec. 14.

Newspapers (Incitements to Offences) Act (VII of 1908), s. 3—Nature of offence under the Act—Incitement to assassination—"Incitement," meaning of—Direct or indirect incitement—General incitement, not addressed to particular persons—Construction of offensive article.

The question of the intention or knowledge of an individual may determine his criminal liability under the ordinary law of abetment by incitement by means of words, written or spoken, but under the Newspapers (Incitements to Offences) Act no question of the intention of the writer, printer or publisher arises, and no personal liability is imputed to any particular person.

The order thereunder is not one against any person, but is purely restrictive and directed against the use, or intended use, of a press for the purpose of printing or publishing a newspaper containing any incitement to murder or to any offence under the Explosive Substances Act (VI of 1908) or to any act of violence.

The words "*any incitement*" in section 3 (1) of the Newspapers Act include direct and indirect incitement, and need not be addressed to any particular person, nor expressed in violent and outrageous terms.

To "*incite*" means "to move to action, to stir up, to stimulate, to instigate or to encourage," and a newspaper article comes within the scope of section 3 if it is, as a matter of fact, calculated, directly or indirectly, to produce that effect.

Per RYVES J. There can be no hard and fast canon as to what words or given set of words constitute "*incitement*." It is a question of fact in each case, and must usually depend largely on concomitant circumstances. The article must be read as a whole and, as far as possible, in the sense in which it was read by the section of the public to which it was primarily addressed, and also considered with regard to the occasion and place of publication and the class or status of persons likely to be affected by it.

In the issue of the "*Bande Mataram*," a newspaper printed and published in Calcutta, dated the 12th September 1908, there appeared an article in four paragraphs entitled "*Traitor*

* Criminal Appeal No. 908 of 1908, against the order of T. Thornhill, Chief Presidency Magistrate, dated Nov. 4, 1908.

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in the Camp," the terms of which are set forth in the judgment of the High Court. By order of the Lieutenant-Governor in a communication, dated the 21st October, from the Chief Secretary to the Government of Bengal, to Superintendent Ellis, C. I. D., a written application was made by the latter under section 3 (1) of the Newspapers (Incitements to Offences) Act, to the Chief Presidency Magistrate, who, after examining him, passed a conditional order, on the 23rd October, declaring the printing press used for printing the said newspaper at 2-1, Creek Row, or found upon the said premises, and all copies of such newspaper, to be forfeited to His Majesty, and directing all persons concerned to appear before the Court, on the 30th instant, to show cause why the order should not be made absolute. A copy of the said order was duly affixed to the said premises, being the premises specified in the declaration made in respect of the "*Bande Mataram*," newspaper, under section 5 of the Press and Registration of Books Act (XXV of 1867).

On the date fixed for the hearing of the case, Girija Sundar Chuckerbutty, the manager of the "*Bande Mataram*," appeared by Counsel and admitted the publication of the obnoxious article in its issue of the 12th September, but denied that it came within the purview of section 3 (1) of the Newspapers Act of 1908. Four witnesses of a formal character were called for the prosecution and the Chief Presidency Magistrate, after hearing the defence, made the conditional order absolute on the 4th November, and directed the issue of a warrant to the police to seize and carry away the printing press. Girija Sundar Chuckerbutty then appealed to the High Court under section 5 of the Act.

The learned Chief Presidency Magistrate stated in his judgment that it was a matter of public notoriety that a conspiracy existed in Calcutta and other places, the object of which was assassination. On the discovery of the conspiracy several persons were arrested and put up for trial at Alipore for manufacturing and being in illegal possession of bombs and for other

offences in connection therewith. Among them were Kanai Lal Dutt, Satyendra Nath Bose and Narendra Nath Gossain. The last-named made a confession and gave further information which led to the arrest of other persons. He was made an approver and his evidence recorded in the preliminary inquiry before the District Magistrate of Alipore. During the pendency of the inquiry he was shot in jail, on the 31st August 1908, by Kanai and Satyendra, who were convicted and executed for his murder.

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Babu Dasarathi Sanyal (with him *Mr. S. C. Mookerjee* and *Babu Debendro Narayan Bhattacharjee*), for the appellants. The only question in the case is whether the article contains any incitement to murder or to any act of violence within the meaning of the Act. The word "*incitement*" is not defined in the Act. It must be construed in its ordinary and natural sense : see Maxwell on Interpretation, pages 2 and 3, and *Vestry of St. John v. Cotton* (1). Refers to the Century, Ogilvie and Webster's dictionaries for the meaning of the word. It being a word of doubtful import, the English law may be looked to as a guide. The English statutes relating to incitement to offences, in which "*incitement*" or its synonym has been used, are 37 Geo. III, c. 70, 7 Will. IV, 1 Vic., c. 36, 24 and 25 Vic., c. 100, and 52 and 53 Vic., c. 52. See also the Irish statutes, 36 Geo. III, c. 37 and 38 Geo. III, c. 57. Having reference to these statutes and the dictionaries, in order to constitute an incitement, there must be a "moving to action," that is, some *active* incitement. A person, who counsels, procures or commands another to commit an offence is guilty of incitement : see Stephen's History of the Criminal Law, Vol. II, p. 230. The article in question, though amounting to wholly unjustifiable and senseless approbation of murder, does not contain any direct incitement, "spurring on" or "urging on" to murder. The writer had no such intention at all.

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The Advocate-General (Mr. Sinha), instructed by *Mr. Hume*, for the Crown. The Act has nothing to do with the intention of the writer, nor is it necessary that the incitement should be direct. It is not necessary that there should be an "aiding or abetting," but even if it were, the article would come under the Act: see *Mayne's Criminal Law*, p. 470. It holds up to admiration Kanai's deed, and implies that others will follow. The act, it says, is historical. A person cannot escape the consequences of his act by veiling his expressions. There may be incitement by approbation of a crime. The expressions "emancipation," "hated monster," "the cause has produced a votary," "giving up his comrades" are full of meaning. The last paragraph of the article, far from minimising the gravity of the offence, really aggravates it. The case of *Reg. v. Most* (1) is similar, though the language is stronger: see also *Queen v. Coney* (2). Refers to *Russell on Crimes*, Vol. I, p. 171, *Archbold*, p. 15, *Stroud's Judicial Dictionary*, p. 419, "counsel or procure," and *Stephen's Digest*, Art. 47, p. 152*n*, for the meaning and character of "incitement." The English statutes cited do not help.

HOLMWOOD J. This is an appeal in what is known as the "*Bande Mataram*" press confiscation case. We admitted the appeal without hearing the application for admission, as the case is the first under the new statute, and it was desirable that the scope and effect of the Act and its bearing on the facts of the present case should receive judicial consideration after full discussion by both parties at the Bar. We have now had the advantage of a very able and temperate argument from the learned *Vakil* for the appellant, *Babu Dasarathi Sanyal*, and a vigorous and well reasoned reply by the learned *Advocate-General*.

We do not propose to go into all the cases cited before us on the subject of abetment by incitement, since those cases are

(1) (1881) 14 Cox C. C. 583; (2) (1882) L. R. 8 Q. B. D. 534, 557.

L. R. 7 Q. B. D. 244.

concerned with the criminal liability and intention of persons under various statutes enacted to punish individuals for words and conduct therein declared unlawful. In the case of those individuals the intention and knowledge of the accused person is necessarily involved. In the present case our task is much simpler. The order is not one against any person ; it is purely restrictive and directed against the use of a certain printing press, which, in the opinion of the Magistrate, on application made by order of, or under authority of, the Local Government under section 3 of the Act (VII of 1908), has been used or is intended to be used for the purpose of printing or publishing a newspaper containing any incitement to murder or to any offence under the Explosive Substances Act (VI of 1908) or to any act of violence.

On this enactment no question of the intention of the writer, printer or publisher arises, and no personal criminality is imputed to any individual. It is a simple question of fact whether the newspaper printed and published by the press in question does contain any incitement as above set out. In this case a conditional order under section (3), clause (1), was issued by the Presidency Magistrate, on the 23rd October 1908, declaring the printing press used for printing the newspaper, known as the "*Bande Mataram*" at 2-1, Creek Row, or found upon the said premises, and all copies of such newspaper, to be forfeited to His Majesty, and calling upon all persons concerned in the said printing press to appear before the Magistrate, on the 30th October, to show cause why the order should not be made absolute.

Counsel for the manager, Girija Sundar Chuckerbutty, the appellant before us, appeared to show cause, and admitted that the article complained of was published by the said press in the "*Bande Mataram*" of the 12th September 1908, but contended that it did not come within section 3 of the Act.

The Magistrate found that the article contained an incitement to murder approvers or to commit acts of violence, and he, accordingly, made the order absolute on the 4th November

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1908. The procedure of the Magistrate under that section is not in any way impugned before us, nor is it contended that it is necessary to prove any criminal intention against any person under the Act. The contention before us is simply this that the article itself does not, as a matter of fact, contain any incitement to murder or to any act of violence.

The argument on this, the only point in the case, divides itself into two heads: *first*, the meaning of the word "incitement," which is not defined in any Indian statute, and, *secondly*, the effect of the article itself read as a whole and in reference to the passages in it, which are found to constitute an incitement.

As regards the first point, it is conceded that the interpretation of an undefined word in an Indian statute cannot be derived from its definition in any English or foreign statute.

But the wording of certain statutes and extracts from the judgments in certain English cases are cited as illustrating the meaning of the word as derived from the recognised dictionaries of the English language, *viz.*, Webster and the Century. These are cited as giving the ordinary meaning of the word, which is all we are really concerned with. Now the words cited from these statutes and cases do not carry the definition any further, and the real object of their citation seems to us to be to import into this case the doctrine of English law that, in order to saddle persons with criminality in certain cases as accessories before the fact, it is necessary that there should be a certain degree of direct incitement.

But, as we said before, there is in this case no question of incriminating any person as accessory to any crime, and the words of the statute are "any incitement," which include direct and indirect incitement.

As to the meaning of the word, we find it to mean "to move to action, to stir up, to stimulate, to instigate or to encourage."

The only question that remains is whether the article in question is, as a matter of fact, calculated, directly or indirectly, to move to action, to stir up, to stimulate, to instigate or to

encourage to murder or acts of violence. The article runs as follows :—

“*Traitor in the Camp.* From Joychand to Omichand is a far cry, but the political history of our country for all those long centuries of indelible shame can be summarized and accounted for in the four short words—‘traitor in the camp.’ Reading down the pages of the annals of that interminable period of disgrace, you will hardly come across the account of a single movement towards emancipation that had not nursed in its bosom one or more vipers named ‘traitors’ who, whilst remaining within the camp in the seeming guise of loyal adherence, betrayed the object of their perjured allegiance at the season of fruition.”

“But need we stop at Omichand? Are there not traitors in the land to-day, who would sell their souls as readily for the paltry privilege of wearing a jewelled sabre, or for a ribbon to stick in their coat, or for a title to cover their base birth with? For it is in the blood of some of our countrymen, this accursed proneness to perfidy, and has been there ever since the loss of our independence, and Heaven alone knows when the last drop of it shall have been spilled or become sterile. And the no less singular feature of this ghastly thing is that, through all these countless years, it is always the person, at whose instance he turned traitor, who has punished the miserable miscreant, but the country could never find a single son to rise and avenge her on the hated monster by smiting him to the ground.”

“Now for the first time the current is turned. For the very first time a cause has produced a votary, who has willingly sacrificed his life to visit on its betrayer his merited doom. Kanai has killed Narendra. No more shall the wretch of an Indian, who kisses away the hands of his comrades, reckon himself safe from the avenging hand. ‘The first of the avengers’ history shall write of Kanai. And from the moment he fired the fatal shot the spaces of his country’s heaven have been ringing with the echo of the voice—‘beware of the traitor’s fate.’”

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"Yet the crowning pity of it is that such a splendid life should have to be thrown away in the course of this bomb affair. Bombs can never bring independence, said Barindra Kumar Ghose in his confession before the Magistrate at Alipore, and truly enough. And it was at a very unlucky and inauspicious moment that he and those he names mistook the voice of the misguided few calling for the blood of an official or two to be the voice of the nation. The removal of a few servants of the bureaucracy cannot even touch the fringe of the problem of national deliverance, and one cannot resist the tear at the thought that there has to be immolated on the altar of an undertaking so fated to fruitlessness such invincibility of spirit, that some passionate, immortal scorn of death that showed itself in Asia after a long interval at Kin-chain the other day."

We think that there can be no doubt not only that the whole article is an indirect and veiled incitement to violence, but that the third paragraph is a direct incitement to murder informers. It is immaterial that two European newspapers, which are exhibited and cited for the defence, have the unwisdom to express a view of the Alipore jail murder, which might lead people to suppose that the murder of an informer was a less heinous offence than the murder of an ordinary person. The legal consequences are the same, and this is duly pointed out, and the legal consequences of incitement to such a murder or to any act of violence must also be the same.

It may be conceded that the incitement in this case is not of the violent and outrageous character of that in the well-known case of *Reg. v. Most* (1), but that case was only cited as an authority for the proposition, which is not disputed before us, that the incitement need not be addressed to any particular person. It has no bearing on the words of this Act which, as we have seen, cover "any incitement," open or veiled.

(1) (1881) L. R. 7 Q. B. D. 244; 14 Cox. C. C. 583.

We may point out that the incitement in this case, addressed as it is to the youth of a peculiarly emotional and intellectually subtle race, is probably the most effective and dangerous form of incitement that could be addressed to them.

The glorification of the votary of the cause "who has willingly sacrificed his life to visit on its betrayer his merited doom" is obviously most calculated to act upon the misguided and unbalanced ardour of youth, who are ready to plunge into hopeless and futile rebellion under the mistaken notion that it is patriotism.

The canonization of Kanai as "the first of the avengers" who has made the spaces of his country's heaven ring with the echo of the voice—"beware of the traitor's fate," evidently contemplates and encourages the notion that others will be thereby induced to follow his example. The threat of violence to any Indian who "kisses away the hands of his comrades" obviously implies that the writer desires to influence his readers to make his threat good.

It is urged that the fourth and last paragraph deprecates assassination, and makes it possible to interpret the third paragraph as mere approbation of the isolated act of Kanai, and not as an incitement to further murders and violence.

But, in our opinion, this paragraph rather aggravates the dangerous character of the article. It deprecates isolated assassinations as useless, but it implies that the wholesale removal of the bureaucracy would assist the cause of national independence. This is obviously in no sense a mitigation of the previous incitement. We find, therefore, that the article complained of does contain an incitement to murder and acts of violence, and that it, therefore, falls within the scope of Act VII of 1908.

It is not contended that any other consequence can follow on this finding than the one and only penalty prescribed by the Act.

We, accordingly, dismiss the appeal, and direct that the order absolute for the forfeiture of the press and all copies

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of the newspaper, "*Bande Mataram*," wherever found, be maintained.

RYVES J. I entirely agree and wish to add only a few words. I do not think there is any real difficulty in ascertaining what the Legislature meant by the word "incitement" in Act VII of 1908. The word itself is familiar enough, and as it has not been specifically defined in this Act or in any other Act of the Indian Legislature to have a special or restricted meaning, I think it should be understood in its ordinary acceptation. If that is so, the only question we have to decide is whether this article amounts to an incitement within the meaning of the Act.

There can, I think, be no hard-and-fast canon to decide what words, or whether a given set of words, constitute an "incitement" to murder or to any act of violence. It is really a question of fact in each case, and must usually depend very largely on concomitant circumstances. We must read the article as a whole, and read it, as far as possible, in the sense in which it was read by that section of the public to whom it was primarily addressed, and must also bear in mind the occasion and place of its publication and the class or status of persons, who are likely to be affected by it. Having regard to all these considerations, I can come to no other conclusion than that the publication of this article on the 12th of September last in the "*Bande Mataram*" newspaper, which was published in Calcutta and circulated in both these provinces, does undoubtedly come within the ban of the Act. I, therefore, agree in the order of my learned brother.

Appeal dismissed.

E. F. M.

CRIMINAL REVISION.

Before Mr. Justice Sharfuddin and Mr. Justice Coxe.

JYOTINDRA NATH DAW

v.

HEM CHANDRA DAW.*

1908
Sept. 10.

Complaint—Dismissal of complaint by Subordinate Magistrate—Refusal by District Magistrate to order further inquiry—Revival of complaint after such refusal—Criminal Procedure Code (Act V of 1898), ss. 203 and 437.

A Subordinate Magistrate who has dismissed a complaint under s. 203 of the Code is competent to revive it notwithstanding that the District Magistrate has refused to order a further inquiry in the matter on application made to him for that purpose.

On the 29th May 1908, one Hem Chandra Daw lodged a complaint before a Deputy Magistrate at Burdwan against the petitioner and others, under sections 352 and 323 of the Penal Code. The Magistrate, after examining the complainant, fixed the 19th June for evidence, acting apparently under section 202 of the Criminal Procedure Code. On that day, the complainant's witnesses being absent, the case was postponed to the 9th July, but the witnesses were still absent, and the complaint was dismissed under section 203 of the Criminal Procedure Code. On the 23rd instant, Hem Chandra moved the District Magistrate of Burdwan for a further inquiry under section 437 of the Criminal Procedure Code, but the latter declined to order such inquiry on the ground that the non-appearance of the witnesses was due to his fault in not taking out processes against them. The complainant then filed a petition before the Magistrate who had dismissed the complaint, praying for a revival of the case. This Magistrate passed an order on the 12th August to the following effect :—

“ In the present case the order of dismissal was for not producing witnesses on the fixed date. There was a motion before the District Magistrate who

* Criminal Revision No. 1015 of 1908, against the order of M. A. Kadir, Deputy Magistrate, Burdwan, dated Aug. 12, 1908.

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declined to interfere with the order of dismissal. If the motion had not been made, I would have passed the necessary orders on this petition, but I think, as the present application is after the District Magistrate's order, it should go to him for orders. All I can say is that I see no legal objection to the revival of the case."

The District Magistrate on the same date passed an order in these terms when the case was referred to him :—

"This matter has nothing to do with me. I have already disposed of the petition of motion which was filed before me. The Deputy Magistrate must act on the petition filed before him according to his own discretion."

The Deputy Magistrate thereupon, after hearing the muktair for the accused, issued a summons against the petitioner under section 323 of the Penal Code.

Babu Narendro Kumar Bose, for the petitioner. The revival of the case by the Deputy Magistrate is *ultra vires*. The District Magistrate's order was an obstacle to his doing so.

SHARFUDDIN AND COXE JJ. This is a Rule calling upon the District Magistrate of Burdwan to show cause why the order of the Deputy Magistrate, dated the 12th August 1908, reviving the case of the petitioner, should not be set aside.

It appears that the complainant in this case lodged his complaint on the 29th May 1908. He was referred to the Assistant Surgeon for examination of his injuries, and was directed by the Court to prove his case on the 19th June 1908, on which date his witnesses were not present. Then the case was fixed for the 9th July. On the 9th July, the case was dismissed under section 203 of the Criminal Procedure Code by the Deputy Magistrate on the ground of the absence of the complainant's witnesses. We then find the complainant moving the District Magistrate on the 23rd July 1908, under section 437 of the Criminal Procedure Code, on which the District Magistrate passed the following order :—"The non-appearance of the witnesses is due to the fault of the complainant who failed to take out process against them. I decline to order further inquiry." We again find that, on the 12th August 1908, the complainant put in a petition before

the Deputy Magistrate who had dismissed the complaint under section 203 of the Criminal Procedure Code praying for a revival of his complaint. This Deputy Magistrate rather hesitated to pass any order on this petition, inasmuch as the complainant had already moved the District Magistrate for a further inquiry and the District Magistrate had refused to interfere in the matter. What the Deputy Magistrate says is this :—" If the motion had not been made, I would have passed necessary orders on this petition, but I think, as the present application is after the District Magistrate's order, it should go to him for orders. All I can say is that I see no legal objection to the revival of the case." When the matter was thus referred to the District Magistrate he passed the following order on the 12th August 1908 :—" This matter has nothing to do with me. I have already disposed of the petition of motion which was filed before me. The Deputy Magistrate must act on the petition filed before him according to his own discretion."

It is clear, therefore, that the District Magistrate did not forbid the Deputy Magistrate to take action on the petition for the revival of the complaint. On the contrary, we find that the matter was left entirely in the hands of the Deputy Magistrate who was asked to exercise his own discretion in the matter. There is no doubt that the Deputy Magistrate who had dismissed the complaint under section 203 of the Criminal Procedure Code could legally revive it after dismissal under section 203. The only hitch that there was in the revival was the District Magistrate's order mentioned above, but the District Magistrate himself sent back the application of the complainant for revival to the Deputy Magistrate for him to pass any order that he thought fit and proper.

In these circumstances, we do not think that the Deputy Magistrate's order to revive the complaint was in any way illegal or *ultra vires*. We, therefore, discharge the Rule. Let the record be sent down without delay.

Rule discharged.

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APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

1909

Jan. 8.

CHANDRA KUMAR MAJHI

v.

SANDHYAMANI.*

*Legal representative—Civil Procedure Code (Act XIV of 1882), ss. 371, 532—
Death of one defendant—Representative of deceased defendant, when can
be substituted—Omission to substitute at death of defendant, effect of—
Agreement between surviving defendant and plaintiffs.*

Where the legal representatives of a deceased defendant (who died after appealing to the lower Court and before the appeal to the High Court) were under the impression that the co-defendant was prosecuting the appeal and challenging the validity of the entire decree, they could not be blamed for their omission to take any steps to have themselves brought on the record, and they ought to be allowed leave to step in and revive and prosecute the appeal on their own behalf on their discovering that the plaintiff had by arrangement relieved the co-defendant of all responsibility and thrown the burden upon the legal representatives of the deceased defendant.

SECOND APPEAL by the petitioners, Chandra Kumar Majhi and others, for revival of the appeal.

The plaintiffs, respondents in this Court, brought a suit for arrears of rent, against Bashiram Majhi, Banamali Majhi and Sridam Majhi. The suit was decreed after contest. Bashiram Majhi and Banamali Majhi preferred an appeal to the District Judge's Court. The appeal was dismissed on the 28th February 1905. Bashiram died in ^{May}_{June} 1905. Banamali alone preferred a second appeal to the High Court. In June 1906, the High Court remanded the case for deciding it after determination of certain points. The case was then transferred to the Court of the Officiating Second Subordinate Judge at Barisal. In March 1907, the plaintiffs, opposite parties, respondents made an application to the said Second Subordinate Judge at Barisal for withdrawal of the suit as against

* Appeal from Original Order No. 457 of 1907, against the order passed by Ashutosh Banerjee, Subordinate Judge of Barisal, dated July 27, 1907.

Banamali. The application was granted and the Court ordered that the decree of the lower Court against the other defendants would stand good.

The petitioners, sons and heirs of Bashiram, made an application under section 371 of the Code of Civil Procedure for revival of the appeal on the ground that the petitioners were all minors at the time of the death of Bashiram, one of them having attained the age of 18 years just then, and that as the petitioners were jointly interested with Banamali in the case, there was no necessity for their appearance in the appeal before the agreement between their co-defendant and the plaintiffs which was prejudicial to their interests. The Subordinate Judge rejected the application for restitution of the appeal on all points. The petitioners, thereupon, appealed to the High Court.

Babu Bepin Chandra Mallik (for *Dr. Priyanath Sen*), for the appellants. It was not at all necessary for the legal representatives of the deceased defendant to take any steps and join the appeal when they knew that their co-defendant was prosecuting the appeal and attacking the entire decree.

No one appeared for the respondent

MOOKERJEE AND CARNDUFF JJ. This is an appeal against an order made under section 371 of the Code of Civil Procedure of 1882 read with section 582, refusing to set aside an order of dismissal of an appeal before the Subordinate Judge of Barisal.

The circumstances under which the order came to be made may be briefly stated. The plaintiffs respondents instituted a suit for rent against three persons, Sridam Chandra Majhi, Bashiram Majhi and Banamali Majhi. In the Court of first instance the plaintiffs succeeded, whereupon Bashiram and Banamali, two of the defendants, preferred an appeal to the District Judge of Barisal. Upon the hearing of the appeal, the case was decided against the appellants. Shortly after this, one of the appellants, Bashiram died; the remaining appellant

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Banamali then preferred a second appeal to this Court. This second appeal was heard on the 13th June 1906, with the result that at the instance of the sole appellant the entire decree of the Court below was set aside and the case was remitted to the Subordinate Judge in order that the appeal might be reheard. When the appeal came to be reheard before the Subordinate Judge, the first appellant Bashiram was dead and no steps had apparently been taken by his legal representatives to bring themselves on the record. In these circumstances, some arrangement was entered into between the other appellant Banamali and the plaintiffs respondents, with the result that the latter applied for leave to withdraw the suit against Banamali. The Subordinate Judge granted the application. But the order which he made did not in terms permit the withdrawal of the suit as against Banamali. He allowed the appeal of Banamali, the result of which would be that the suit was dismissed as against Banamali, and he went on to add that the decree of the first Court as against the other defendants would stand good. If we appreciate the effect of his order correctly, the result of this arrangement between the plaintiffs and the defendant Banamali was that the entire burden of the decree for rent made by the Court of first instance was thrown upon the other defendants, who were not represented before the Subordinate Judge. It is not necessary for us to express any opinion as to the propriety of the order which the Subordinate Judge made, because that order is not in question before us in the present case. But the result, which might have been anticipated, followed. As soon as the legal representatives of Bashiram discovered that the plaintiffs had withdrawn their suit against Banamali and thrown the entire burden of the decree upon them and Sridam, they applied for permission to revive the appeal and prosecute it. The learned Subordinate Judge held that they had not made out any sufficient cause within the meaning of section 371 of the Civil Procedure Code, which prevented them in due time from continuing the appeal. We are unable to accept the view taken by the Subordinate Judge. Upon the facts which we have stated, it is quite clear that upon the death of Bashiram,

Banamali alone prosecuted the appeal to the High Court, and the legal representatives of Bashiram were under the impression that as Bashiram was prosecuting the appeal and challenging the validity of the entire decree, it would not be necessary for them to take any steps and join in the appeal. They cannot, therefore, be blamed for their omission to take any steps to have themselves brought on the record. But as soon as they discovered that Banamali had arranged with the plaintiffs to be relieved of all responsibility and had thrown the burden upon them, they applied for leave to revive and prosecute the appeal, and in our opinion, they ought to have been allowed to do this.

The result, therefore, is that this appeal must be allowed and the order of the Court below set aside. The appeal will be revived so far as the applicants are concerned and they will be allowed to prosecute it before the Subordinate Judge, who will, at their instance, now carry out the directions given in the judgment of this Court in appeal from appellate decree No. 1179 of 1905.

The appellants are entitled to their costs of this appeal as against the plaintiffs respondents.

Appeal allowed.

S. N.

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APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

1909

Jan. 11.

CHANDRABALA DEBI

v.

PRABODH CHANDRA RAY.*

Execution—Sale—Adjournment of sale for compromise—Time, the essence of the agreement of parties—Failure to pay on the final date—Part-payment, refusal to accept—Jurisdiction of Court to extend time—Civil Procedure Code (XIV of 1882), ss. 244, 311.

Where time had previously been repeatedly granted by the Court at the instance of the judgment-debtor with the consent of the decree-holders for compromise, and on the final date to which payment was adjourned, the judgment-debtor prayed for further time and the decree-holder demanded it as a condition precedent to the grant of further time that the judgment-debtor should definitely agree that, upon her failure to pay the money on the date to be fixed, her right to challenge the validity of the sale should finally cease, and such an arrangement was definitely sanctioned by the Court with the consent of all the parties :—

Held, that the Court had no jurisdiction subsequently to vary the terms of the final agreement, at the instance of the judgment-debtor, in spite of the protest of the decree-holder.

Harakh Singh v. Saheb Singh (1) explained and followed. *Uttam Chandra Krithy v. Khetra Nath Chattopadhyaya* (2) referred to.

Held, further, that an appeal need not be preferred against every interlocutory order in an execution proceeding.

Behary Lal Pundit v. Kedar Nath Mullick (3) followed.

Held, also, that it is open to the party aggrieved to challenge by an appeal against the final order, which determines the rights of the parties, the propriety of the interlocutory orders made in the course of the proceedings.

SECOND APPEAL by the petitioner, Chandrabala Debi.

The property of one Rajendra Kumar Ray Chaudhuri was sold in execution. Chandrabala Debi, the petitioner in this

* Appeals from Appellate Orders Nos. 145 and 158 of 1908, against the order of E. P. Chapman, District Judge of 24-Parganas, dated Jan. 20, 1908, reversing the order of Amrita Lal Palit, Munsif of Alipur, dated Aug. 27, 1907.

(1) (1907) 6 C. L. J. 176.

(2) (1901) I. L. R. 29 Calc. 577.

(3) (1891) I. L. R. 18 Calc. 469.

case, applied as the administratrix of her husband's estate, under sections 244 and 311 of the Civil Procedure Code to have the sale set aside. Thereupon, an agreement had been come to with the decree-holder that if the amount due under the decree were paid the sale would be set aside. Petitions setting forth the terms of the agreement were filed on the 29th June 1907, and there was no stipulation as to the time within which the decretal amount should be paid. On the 22nd July the judgment-debtor filed a petition saying that the parties had agreed to 15 days' time being given for payment. The hearing was adjourned to the 31st July. On the latter date, the judgment-debtor filed another petition setting out an agreement with the decree-holder for 15 days' time for payment, and that it was agreed that if the payment were not made within that time the sale should hold good. On the 15th August the judgment-debtor again applied for time. The application was resisted by the decree-holder. The Court, however, allowed a week's time and permitted the judgment-debtor to deposit part of the decretal amount. The judgment-debtor deposited the remainder of the decretal amount on the 21st August, and applied on the 27th August to have the sale set aside. The decree-holder objected on the ground that the Court had no power to grant time after the 15th August, the parties having agreed that in default of payment on that date, the sale should stand good. The Munsif overruled the objection and set aside the sale. On appeal, the District Judge reversed the orders of the Munsif. The petitioner preferred a second appeal to the High Court.

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Mr. A. Caspersz (Babu Surendra Chandra Sen with him), for the appellant, contended that time was not the essence of the contract. See, as to the effect of agreement, *Munshi Amir Ali v. Inderjit Koer* (1) and *Anant Das v. Ashburner & Co.* (2). The decree-holder sold the property in execution. By the agreement, my right to reopen under sections 244 and 311 was abandoned: see *Uttam Chandra Krithy v. Khetra Nath*

(1) (1871) 9 B. L. R. 460.

(2) (1876) I. L. R. 1 All. 267.

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Chattopadhyaya (1) and *Harakh Singh v. Saheb Singh* (2). As to discretion of Court and its powers, see the new Code (Act V of 1908), section 151.

Babu Neelmadhab Bose, for respondent. In these matters, besides the parties, there is a third party, *viz.*, the Court. Without the sanction of the Court no agreement can be effective, nor can an agreement be modified. The Court has neither the jurisdiction to vary the terms of the agreement against the wishes of one of the parties to the agreement. In all such applications, time is of the essence of the agreement. The third application (*viz.*, of the 31st July) conclusively proved that time was of the essence of the contract. The time allowed for payment was sufficient, and it was never contended in the Courts below that it was not.

Mr. Caspersz, in reply. Certainly, the decree-holder should have appealed against the interlocutory orders immediately after they were passed.

MOOKERJEE AND CARNDUFF JJ. These appeals are directed against two orders of the District Judge of 24-Parganas by which he discharged two orders made by the Munsif setting aside two execution sales held on the 29th March and 30th October 1906, respectively. The circumstances under which these orders were made must be set out in detail in order that our decision may be intelligible.

It appears that applications were made by the judgment-debtor to set aside these execution sales under sections 244 and 311 of the Code of Civil Procedure of 1882, on the ground of fraud and material irregularity. During the pendency of these proceedings the parties negotiated for a compromise, and on the 1st June 1907 an application was made to the Court for an adjournment to enable them to carry it out. In this application it was stated that a proposal for an amicable settlement was in progress, that the decree-holder had agreed to

give back the auction-purchased property and that consequently a month's time was necessary. The Court, however, did not adjourn the case for a month, and fixed the 29th June as the next date for hearing. On that date the judgment-debtor made another application asking that the case might be adjourned again. This application recited that an agreement had been entered into by the parties to the effect that the sales would be set aside on payment to the decree-holder of the whole amount of the decree with costs, that the judgment-debtor had not been able to collect the necessary money, that she was in difficulty and that she could not raise funds without the permission of the District Judge, apparently because she was in possession of her husband's estate as administratrix. The petition concluded with the statement that if she found herself unable to pay any money to the opposite party, on default of payment the sale would stand good, and she consequently prayed for three weeks' time. The Court thereupon adjourned the case to the 22nd July. It should be observed that this exceeded by two days the period of three weeks' time for which the parties had asked, the explanation apparently being that the first day after the three weeks as well as the day following were holidays and the Court adjourned the case to the first open day after the holidays. If this petition be taken as a whole, it may reasonably be contended that no time was fixed for the payment of the money, and that in any event time was not made the essence of the agreement, and this is the view most favourable to the case of the judgment-debtor. On the 22nd July there was again another petition on behalf of the judgment-debtor. In this it was stated that the money had not then been raised, that it could be raised only by a mortgage of the properties upon permission of the District Judge, and that in order to enable her to do so, it was necessary to adjourn the case for a further period of 15 days. The petition also recited that on the date fixed the dues would be paid, and on default the sale would stand good. The decree-holder signified his consent to this application in consideration of Rs. 9 paid on that date. The

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Court, however, did not sanction the arrangement and granted only nine days' time as appears from the following order recorded in the order sheet: "on the application of the petitioner consented to by the opposite party, ordered to be put up on the 31st July 1907 for hearing, Rs. 9 to be credited towards the decretal money." It will be observed that as the Court did not sanction the application of the parties, it cannot be successfully contended that upon the failure of the judgment-debtor to pay the decretal amount to the decree-holder as agreed upon, the sale would stand confirmed. On the 31st July there was a fresh application by the judgment-debtor. In this she stated that although two adjournments had been previously granted with the consent of the decree-holder for payment of the sum decreed to him, she had not been able to raise the necessary funds. She, therefore, prayed that another 15 days' time might be given to her. The petition concluded with the following very important provision: "If I pay the whole of the decretal amount, the sales will stand cancelled. On default of payment of the whole money on that date, the sales will stand good, and I shall not further pray for time." The decree-holder signified his consent in the following terms at the foot of the petition: "If the money is not paid within the date fixed, the sale will stand good. Upon this condition I take Rs. 10 and give sanction to this application." The matter was then placed before the Court and the following order was recorded on the order sheet: "On the application of the petitioner consented to by the opposite party, ordered—put up on the 15th August next for orders on condition stated thereon, Rs. 10 to be credited against the decretal money." When, however, the 15th August came, the judgment-debtor still found herself unable to pay the decretal amount as she had agreed to do, and on that date she applied for further time. To this the execution-creditor objected. The learned Judge did not then decide what the effect of a partial payment on that date or at a later stage would be, but permitted the judgment-debtor to deposit Rs. 150 in Court and allowed her time till the 21st August to pay the balance of the decretal

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money. The decree-holder, however, declined to accept the sum deposited. Subsequently on the 21st August the judgment-debtor put in another application in which it was stated that she had offered the balance to the decree-holder, who had refused to accept the money. The Court thereupon ordered that the applicant might be allowed to deposit the money as prayed for. The money was deposited, and on the 27th August 1907 the Court set aside the sales. The Munsif held in substance that he had jurisdiction to extend the time for payment of the money, and that the execution creditor was bound to accept the sums deposited in Court and to apply the same in satisfaction of his decree. The decree-holder was dissatisfied with these orders and appealed to the District Judge, who has held that the orders cannot be supported. His view in substance is that the application of the 31st July, which was assented to by the decree-holder and confirmed by the Court, embodied an agreement binding upon both parties, that upon breach of that agreement an indefeasible right accrued to the decree-holder to demand that the sale should stand unreversed, and that it was not open to the Munsif, in the exercise of his discretion, to extend the time for the payment of the money due by the judgment-debtor. In support of this view the learned District Judge placed reliance upon the decision of this Court in the cases of *Uttam Chandra Krithy v. Khetra Nath Chattopadhyaya* (1) and *Harakh Singh v. Saheb Singh* (2).

The judgment-debtor has now appealed to this Court, and on her behalf it has been contended that the District Judge was in error in relying upon the application of the 31st July 1907, and that the agreement which regulates the rights of the parties is to be found embodied in the application of the 29th June 1907. It has also been argued that the effect of this petition, which was assented to by the decree-holder, was to leave it open to the Court to decide what would be a reasonable time within which the judgment-debtor might satisfy the decretal amount. The learned counsel for the appellant has,

(1) (1901) I. L. R. 29 Cal. 577.

(2) (1907) 6 C. L. J. 176

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in fact, contended that, after this application of the 29th June had been made, the Court had seisin of the case, and it was not open to the parties subsequently to modify the arrangement into which they had entered on that date. In support of this contention, much reliance was placed upon an observation in the judgment of this Court in *Harakh Singh v. Saheb Singh* (1) to the effect that, in cases of this description, what the Court has to do is to determine whether the parties intended in the first conception of the agreement to make time the essence of the contract. On the other hand, it has been argued on behalf of the decree-holder that an agreement of this character can be operative only with the assent of the Court, and that, if the Court does not sanction a particular arrangement and refuses to grant an adjournment, the agreement can have no practical effect. This position the appellant did not contest, and we feel no doubt that it represents the right view of the matter. But the necessary inference from this position is that, if initially an agreement is entered into by the parties with the assent of the Court, it is open to the parties at a subsequent stage with the approval of the Court to modify that agreement. This view is in no way inconsistent with the decision in *Harakh Singh v. Saheb Singh* (1) where no question arose or was decided as to the power of the parties to modify the original agreement. The question then is—Was there such a modification in the present case? In our opinion, there is no room for doubt that, whatever might have been the character of the original agreement of the 29th June 1907, it was modified by the application of the 31st July 1907. Assume for a moment that upon the application of the 29th June it would have been open to the Court, as a Court of Equity to determine what would be a reasonable time for the payment of the money, it cannot be suggested that the Court could not at a later stage, upon the joint application of the parties, alter that agreement and give its sanction to a fresh arrangement which would finally regulate the rights of the parties. What was then the effect of this agreement of the 31st

(1) (1907) 6 C. L. J. 176.

July ? Time had previously been repeatedly granted by the Court at the instance of the judgment-debtor with the consent of the decree-holder. On the 31st July the judgment-debtor prayed for further time, the decree-holder insisted, not unreasonably, upon more stringent terms and demanded it as a condition precedent to the grant of further time that the judgment-debtor should definitely agree that, upon her failure to pay the money on the date to be fixed, her right to challenge the validity of the sale should finally cease. The judgment-debtor consented, and the Court sanctioned this arrangement. We need not, therefore, consider what the position of the parties would have been, if the arrangement proposed by the parties on the 31st July had not been approved by the Court ; possibly it might then have been open to the Court to proceed on the footing of the original application of the 29th June and exercise its jurisdiction accordingly. But after the Court had sanctioned the arrangement entered into by the parties on the 31st July, the Court could not, in our opinion, subsequently at the instance of the judgment-debtor and in spite of the protest of the decree-holder, vary the terms of the agreement. This is clear from the decision of this Court in *Harakh Singh v. Saheb Singh* (1) already referred to. As the learned vakil for the respondent contended, there were three parties to the agreement, the decree-holder, the judgment-debtor, and the Court, and, once the agreement had resulted from their concurrence, it could not be subsequently modified except by the assent of each and every one of them. That was not done in this case. We must, therefore, hold that the orders of the Munsif made on the 15th August 1907, permitting the judgment-debtor to deposit Rs. 150 on that date to the credit of the decree-holder and also allowing her time to put in the balance of the decretal money on the 21st August, were made without jurisdiction. The learned counsel for the appellant, however, contended that if this view be adopted, the decree-holder ought to have immediately preferred an appeal against these orders. In our opinion,

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it was not necessary for him to do so. As was pointed out by this Court in the case of *Behary Lal Pundit v. Kedar Nath Mullick* (1) an appeal need not be preferred against every order in an execution proceeding. If the contrary view prevailed, and if appeals were allowed to be preferred against interlocutory orders, there might be innumerable appeals in the course of one execution proceeding. It is open to the party aggrieved to challenge by an appeal against the final order which determines the rights of the parties, the propriety of the interlocutory orders made in the course of the proceedings. Besides, in this case, as the learned vakil for the respondent pointed out, in the appeal which was preferred against the final order, the order of the 15th August was specifically mentioned as an order which ought not to stand. We are of opinion, therefore, that it was open to the learned District Judge, in hearing the appeal against the orders of the 27th August, to determine the validity of the orders of the 15th August. On these grounds, we must hold that the orders of the District Judge are correct and should be affirmed. The result is that the appeals fail and must be dismissed with costs.

Appeal dismissed.

S. M.

(1) (1891) I. L. R. 18 Calc. 469.

ORIGINAL CIVIL.

Before Mr. Justice Stephen.

MAHOMED SHAH

v.

OFFICIAL TRUSTEE OF BENGAL.*

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Mahomedan Law—Trust deed—Life interest with remainder over—Gift to unborn persons.

A deed creating a life interest with remainder over is void under the Mahomedan Law. Similarly a gift to unborn persons is void.

Shahebzadah Mahmud Faradoon Jah v. Shahebjadi Fakir Johban Begum (1), *Shahebzadah Mahomed Abdool Hossain v. The Official Trustee of Bengal* (2), and *Shahebzadah Mahomed Mouzzumuddeen v. The Official Trustee of Bengal* (3) followed.

ORIGINAL SUIT.

THIS was a suit brought by the plaintiff, Shahebzadah Mahomed Mahmud Shah, a member of the Mysore family and a beneficiary under the Mysore Trust Deed, dated the 19th November 1867, for construction of that deed and to have it declared that he was the absolute owner of certain promissory notes for Rs. 37,500, now in the custody of the Official Trustee.

Under this deed, these promissory notes were given to the Official Trustee in trust to pay the income to the plaintiff during his life and after his death to his widow and children in certain shares. The plaintiff had one issue, a son, named Mahomed Behroze Shah, who together with the plaintiff's wife, Shahebzadee Noorunnessa Begum, were made party defendants to the suit. At the time the Trust Deed was executed the plaintiff had no children. The Official Trustee left the construction of the deed to the Court.

Mr. L. P. E. Pugh and *Mr. N. N. Sircar*, for the plaintiff.

Mr. Hyam, for the defendants Shahebzadee Noorunnessa Begum and Shahebzadah Mahomed Behroze Shah.

* Original Civil Suit No. 567 of 1908.

(1) Suit No. 121 of 1907. (Unreported). (2) Suit No. 567 of 1908. (Unreported).

(3) Suit No. 791 of 1901. (Unreported.)

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Mr. Langford James, for the Official Trustee.

STEPHEN J. The plaintiff in this case sues to have it declared that he is the absolute owner of a certain Government promissory notes of the value of Rs. 37,500 now in the custody of the Official Trustee.

The case depends on a deed of the 19th November 1867 by which provision was made for the proper maintenance of the Mysore family.

The matter has been frequently before this Court, already points of law having been raised both under the present deed and under other deeds with similar effect. The plaintiff by this deed takes a life interest with remainder to certain other persons. It has been held that this is void by Mahomedan Law. It has also been held under this deed that trusts declared after the life interest are void as gifts to unborn persons. In accordance with this decision I give judgment in favour of the plaintiff in terms of prayers 1, 2, 4 and 5 of the plaint. It has been suggested on behalf of the Official Trustee and the appearing defendant that the whole deed is void, but the failure of the interests subsequent to that in favour of the plaintiff being void, it is not necessary to set aside the whole deed. The cases to which I have been referred are as follows :—*Shahebzadah Mahmud Faradoon Jah v. Sahebjadi Fakir Johban Begum* (1), *Sahebzadah Mahomed Abdool Hossain v. The Official Trustee of Bengal* (2) and *Sahebzadah Mahomed Mouzzumuddeen v. The Official Trustee of Bengal* (3).

The Official Trustee is entitled to his charges and commission, if any due to him, out of the subject-matter of the suit. I give judgment for the plaintiff, accordingly, with costs. The appearing defendants are also entitled to their costs.

Costs to be taxed on scale No. 2.

Attorney for the plaintiff : *N. N. Mitter*.

Attorneys for the defendants : *Gregory and Jones*.

Attorneys for the Official Trustee : *Orr, Dignam & Co.*

(1) Suit No. 121 of 1907. (Unreported). (2) Suit No. 567 of 1908. (Unreported).

(3) Suit No. 791 of 1901. (Unreported).

APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Barington, and Mr. Justice Brett.

L. O. CLARKE

v.

BROJENDRA KISHORE ROY CHOWDHRY.*

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Trespass—Bond fides—Search for arms by Magistrate, whether executive or judicial act—Protection of Judicial Officers Act (XVIII of 1850), s. 1—Statutory powers of Executive Officers, how to be exercised—Indian Arms Act (XI of 1878), s. 25—Provision “having first recorded grounds of his belief,” whether mandatory or directory—Criminal Procedure Code (Act V of 1898), ss. 94, 96, 105, 106, 165—Search-warrant—Magistrate as “Court”—Search by police officer—Police Act (V of 1861), s. 4—Powers of District Magistrate—Letters Patent of 1865, s. 20—Extraordinary original civil jurisdiction of High Court.

For some time previous to the 27th April 1907, there had been a considerable tension of feeling between the Hindus and Mahomedans at Jamalpur, in the District of Mymensingh. On the 27th April a Mahomedan was shot by a Hindu, and a serious conflict was narrowly averted by the Sub-divisional Officer and the District Superintendent of Police. On the arrival of the District Magistrate in Jamalpur, on the morning of the 28th April, he received reports from the two Officers of the occurrences of the 27th April, and he was also informed that the police had reason to believe that fire-arms were stored in certain cutcheries belonging to Hindu zemindars. In consequence, the District Magistrate accompanied by the District Superintendent of Police proceeded to search the cutcheries. Under the orders of the District Magistrate, the cutchery of the respondent was forcibly entered, boxes forced open, and search made. On an action instituted against the District Magistrate for trespass, it was found as a fact that he had acted with perfect *bond fides*:—

Held (Brett J. dissenting), that according to the principles of equity, justice and good conscience, the search constituted an actionable trespass unless warranted by some Statute, and in the circumstances of the case, the search was warranted by no Statute. When Executive Officers are invested with Statutory powers of a special and drastic nature, before exercising those powers, they must strictly comply with the provisions of the Act which created them.

The search being a general search for arms, was not warranted by section 25 of the Arms Act of 1878, which required that before making the search,

* Appeal from Original Civil, No. 36 of 1908.

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the Magistrate should first record the grounds of his belief, in terms of the section which was not done. The words "having first recorded the grounds of his belief" in section 25 are mandatory.

The search was not warranted by section 105 of the Criminal Procedure Code, as, in the circumstances of the case, the Magistrate was not acting as a "Court."

The search was not warranted by section 135 of the Criminal Procedure Code: that section does not apply to a Magistrate.

Semle: a general search for arms would be governed rather by the provisions of the Arms Act, than by the provisions of the Code of Criminal Procedure.

The search must be taken to have been conducted by the Magistrate in his *executive* and not in his *judicial* capacity, and hence he was not protected by Act XVIII of 1850.

Per Harington and Brett JJ. The issue of a search-warrant by a competent Magistrate is a judicial act.

Hope v. Evered (1), *Mahomed Jackariah & Co. v. Ahmed Mahomed* (2), and *In re Lakshmidas Naranji* (3) referred to.

APPEAL by the defendant, L. O. Clarke, from the judgment of Fletcher J.

This suit was instituted by Brojendra Kishore Roy Chowdhry, a wealthy and influential zemindar of Mymensingh, for the recovery of the sum of Rs. 10,500 as damages alleged to have been caused by the wrongful trespass of Mr. L. O. Clarke, the District Magistrate of Mymensingh, in searching the plaintiff's *cutchery* at Jamalpur on the 28th April 1907. Brojendra Kishore Roy Chowdhry was the owner of a 12-annas share in the Gouripur estate in Jamalpur in the district of Mymensingh, the remaining 4-annas share belonging to his mother Sreemutty Bisweswari Debi Chowdhurani, who instituted a similar suit on the same cause of action, the decision of which both in the Court of first instance and on appeal was governed by the judgment in the present action.

It appears that on the 21st April 1907, the annual fair or *mela* was held at Jamalpur. It was alleged that certain Hindus, at the instigation of the Hindu servants of the respondent and other zemindars, tried to prevent the sale of *bideshi* or

(1) (1886) L. R. 17 Q. B. D. 338. (2) (1887) I. L. R. 15 Calc. 109, 141.
 (3) (1903) 5 Bom. L. R. 980, 982.

foreign goods at this fair, in furtherance of the "boycott" movement, which had been established in Jamalpur. The Mahomedans resented this interference, and a serious disturbance ensued, the feelings of the Mahomedans towards the Hindus being considerably embittered. It was alleged that Pursa Nath Sen and Satish Chandra Banerji, the Superintendents of the plaintiff and his mother, residing in their respective cutchery premises were chiefly responsible for the disturbance. On the evening of the 27th April at about 9-30 P.M., a Mahomedan named Genda was shot with a revolver. Mr. Barniville, Sub-divisional Officer of Jamalpur, and Mr. Luffman, District Superintendent of Police, who were then in the Inspection Dāk Bungalow, on hearing the sound of three or four shots proceeded to the scene of disturbance and met some Mahomedans carrying away the wounded man. The officers were informed that the persons concerned in the shooting were certain Hindus, who had fled to and taken refuge in the zemindary cutcherries. The zemindary cutchery premises of the respondent and his mother, those belonging to the Ramgopalpur Estate, and the Doya Moyee temple buildings were all situated close together on an open piece of ground. The two officers, with a body of policemen with a view to arresting the men, proceeded towards the cutcherries, near which an excited mob of Mahomedans armed with *lathis* had already collected. The officers entered the cutchery premises, and arrested four Hindu strangers there on suspicion. They also found in the cutchery Satish Chandra Banerji with forty or fifty men armed with *lathis*, whom they induced to lay down their arms. They were then informed that armed men were concealed in the adjoining temple of Doya Moyee, and proceeded there. The door was locked and they were refused admission. The Sub-divisional Officer ordered the persons inside to open the door, promising that no harm should be done to them. A large angry crowd of Mahomedans were assembled close by, but they appear to have been under control. The door was not opened, but four shots were fired from inside the temple and a Mahomedan was wounded. The two

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officers then drew off the Mahomedan crowd and managed to disperse them.

The Sub-divisional Officer then wired to the Commissioner of the Division for all available armed police, and the District Superintendent of Police sent a telegram to Mymensingh to the appellant, as District Magistrate to the following effect: "serious riot just averted—come at once." The appellant received this telegram at 2 A.M. on the 28th April, and he arrived at Jamalpur at 10 A.M., the same morning.

On his arrival the appellant received from Mr. Barniville, the Sub-divisional Officer, and from Mr. Luffman, the District Superintendent of Police, reports of the occurrences of the 27th April, and he was also informed that the police had reason to believe that fire-arms were stored in the cutcheries. In consequence of this information the appellant determined to search the cutcheries. Without making any record of the reasons for his conduct the appellant, accompanied by Mr. Barniville, Mr. Luffman, and several police and in the presence of certain witnesses proceeded to search the cutcheries of the respondent and of the other zemindars. The temple of Doya Moyee and the cutchery and naib's house of the Ramgopalpur zemindar were first searched: afterwards the cutchery of the plaintiff. At the time, all the buildings and boxes were found locked and no responsible officers of the respondent's cutchery could be found, nor could any keys. The padlocks closing the doors of the building were forced open, the boxes in the cutchery were similarly forced open, and their contents, zemindary papers, taken out in pursuit of the search for arms. The search of the buildings took from 1-30 P.M. to 3-30 P.M. This was the trespass complained of.

The respondent instituted this suit on the 25th July 1907 in the Court of the Third Subordinate Judge of Mymensingh. He alleged that the appellant, accompanied by Mr. Barniville, Mr. Luffman, certain subordinate officers, policemen and Mahomedan rowdies wrongfully and wantonly trespassed into his cutchery, and that in the presence of the appellant and under his orders boxes, chests and almirahs were

forcibly, wantonly and wrongfully broken open, and the contents thereof, valuable zemindary papers and documents were scattered, destroyed and mutilated: he charged the appellant with acting wrongfully, maliciously, without any lawful or reasonable justification or authority, and without any reasonable or probable cause: and he submitted he had suffered great insult, injury and humiliation, and been put to great inconvenience and difficulty owing to the loss and destruction of his zemindary documents, assessing his damages at Rs. 10,500.

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Mr. L. O. Clarke in his written statement, filed on the 9th November 1907, contended that the search of the 28th April 1907 was justifiable and necessary, inasmuch as he had reason to believe that arms were in the possession of Pursa Nath Sen and Satish Chandra Banerji for unlawful purposes, in the cutchery premises occupied by them, and that they could not be left in possession of the same without danger to the public peace, and that the production of such arms was, in his opinion and in the opinion of the Superintendent of Police, necessary and desirable for the purposes of an investigation then being made by the Superintendent of Police. He alleged that he and the Superintendent of Police directed a search for arms to be made in his presence and under the conduct of the Superintendent of Police, and nothing more was done, nor damage caused beyond what was necessary and unavoidable in order to obtain admittance and access for the purpose of the search. The defendant contended that as District Magistrate, he acted under and by virtue of the powers conferred upon him by sections 94, 96, 105 and 165 of the Criminal Procedure Code, and in the alternative by section 25 of the Indian Arms Act, 1878, and claimed protection under the Act for the Protection of Judicial Officers (Act XVIII of 1850), as having acted judicially and in the discharge of a judicial duty.

On the 26th November 1907, the defendant applied to the District Judge of Mymensingh for the transfer of the suit for trial from the Court of the Subordinate Judge to that of the District Judge. On the 3rd January 1908, the plaintiff applied

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to the High Court in its extraordinary original civil jurisdiction to transfer the suit from the Court of the Subordinate Judge of Mymensingh to the High Court for trial, and obtained a rule *nisi*. On the 29th January 1908, an order was passed by Fletcher J. transferring the suit to the High Court to be tried by it in the exercise of its extraordinary original civil jurisdiction.

The suit came on for hearing before Fletcher J. At the trial Mr. Luffman, the District Superintendent of Police, was not called as a witness to prove that the search was necessary to the conduct of an investigation into an offence which he had in hand. Witnesses were called by the plaintiff to speak to the unnecessary violence, alleged to have been resorted to during the search. Against this the defendant's evidence was that only one complaint was made to him, that the police were doing unnecessary damage, and that "he took steps to see to it."

Fletcher J. found that the defendant had acted entirely *bonâ fide*, but that the search of the plaintiff's premises was not warranted by law, and that the defendant's entry constituted an actionable trespass. He accordingly on the 19th June 1908 gave judgment for the plaintiff, allowing him Rs. 500 as damages. His Lordship's judgment was as follows :—

Fletcher J. In this suit the plaintiff, who is a wealthy zemindar in the District of Mymensingh, sues the defendant, who is a member of the Indian Civil Service and was during the month of April 1907 District Magistrate of Mymensingh, to recover damages for an alleged trespass committed by the defendant in searching the plaintiff's cutchery at Jamalpur on the 28th of April 1907. The defence raised by the defendant is that he was authorized to conduct the search by Statute. The Statutory provisions relied on by the defendant are (a) the Indian Arms Act, 1878, (b) the Code of Criminal Procedure and (c) Act XVIII of 1850 ("an Act for the Protection of Judicial Officers").

Now the facts relating to the search may be shortly stated as follows :— On the 28th April 1907, the defendant who was then at Mymensingh received in the early morning an urgent telegram from Mr. Barniville, the Sub-divisional Officer, and Mr. Luffman, the Head of the Police at Jamalpur, informing him that a riot had narrowly been averted on the previous night. The state of feeling between the Hindus and Mahomedans at Jamalpur had been very intense since the 21st April, but the reasons for the origin of that state are not material to be considered here.

Upon receipt of the telegram above-mentioned the defendant started for Jamalpur and arrived there at 10 o'clock in the morning. On his arrival he was informed by Mr. Luffman of the fact that a man named Genda Shaik had been wounded on the previous evening by a shot fired from a revolver or a gun and that the police had heard that the zemindars had been storing firearms in their cutcheries.

Upon receipt of this information the defendant determined to search the cutcheries of certain zemindars in the district including the plaintiff's cutchery and having summoned certain gentlemen to be witnesses of the search, he proceeded on the afternoon of the 28th April to search the cutcheries accompanied by Mr. Barniville, Mr. Luffman and a number of police and the witnesses to the search. The plaintiff's cutchery was searched between 3 and 4 in the afternoon and it is with regard to this search that the plaintiff seeks to recover damages in this suit. The defendant admits the fact of the search and that it was done by his orders and under his directions, but pleads that he was authorized to conduct the search by virtue of the provisions of the Statutes above-mentioned.

Now the general rule of the common law is that a Magistrate is liable in an action of trespass for acts done by him to the persons or property of others unless he can justify the act as having been done under the authority of the law. And if a Magistrate pleads a Statute or Statutes as justifying his acts he must bring himself within the words of the Statutes strictly.

It becomes necessary therefore, in the first place, to consider the statutory provisions relied on by the defendant as authorising the search.

The first of these statutory provisions section 25 of the Indian Arms Act, 1878, is in the following terms :—

“Whenever any Magistrate has reason to believe that any person residing within the local limits of his jurisdiction has in his possession any arms, ammunition, or military stores for any unlawful purpose or that such person cannot be left in the possession of any such arms, ammunition or military stores without danger to the public peace, such Magistrate having first recorded the grounds of his belief may cause a search to be made of the house or premises occupied by such person or in which such Magistrate has reason to believe such arms, ammunition or military stores are or is to be found, and may seize and detain the same although covered by a license and keep in safe custody for such time as he thinks necessary. The search in such case shall be conducted by or in the presence of a Magistrate or by or in the presence of some officer specially empowered in this behalf by name or in virtue of his office by the local Government.” The defendant admits in the present case that he did not before causing the search to be made first record the grounds of his belief as provided by section 25 of the Arms Act. He says he had no copy of the Arms Act with him although he admits he could have obtained one from the Sub-divisional Officer in a few minutes.

In these circumstances, the defendant not having complied with the provisions of that Statute cannot justify the search under the provisions of the Indian Arms Act.

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Secondly, the defendant relies upon the provisions of ss. 105 and 165 of the Code of Criminal Procedure. Section 105 of the Criminal Procedure Code enacts that a Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search warrant under the provisions of the Code. It is obvious in the present case, the defendant was not competent to issue a search warrant under the provisions of the Criminal Procedure Code. The defendant was not acting as a "Court" within the meaning of s. 94 of the Criminal Procedure Code as there was no proceeding pending before him.

But then it is said that even if the defendant cannot justify the search under the provisions of s. 105 of the Criminal Procedure Code, yet as he took Mr. Luffman along with him who was making an investigation into the case of Genda, the man who had been wounded on the night of the 27th April, the search can be justified as being a search made by Mr. Luffman.

In my opinion this section will not avail the defendant. I am satisfied on the evidence that the search was not intended to be under the provisions of s. 165 of the Criminal Procedure Code. The search of the plaintiff's and the other cutcheries was for the purpose of discovering arms generally which s. 165 does not authorize.

In my opinion the search made by the defendant was not, nor was it ever, intended that it should be made under s. 165 of the Criminal Procedure Code and I accordingly hold that that section does not justify the defendant's action.

Lastly the provisions of Act XVIII of 1850 ("an Act for the Protection of Judicial Officers") are relied on by the defendant. Such Act provides that no Judge, Magistrate, Justice of the Peace, Collector or other persons acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in discharge of his judicial duty whether or not within the limits of his jurisdiction provided that he acted in good faith.

Now in order that the defendant should bring himself within the provisions of that Statute, it is necessary that the act done or ordered to be done by him should be done or ordered to be done by him in discharge of his judicial duty. What judicial duty was the defendant performing in conducting the search of the plaintiff's premises? In my opinion he was performing no judicial duties at all. The defendant as District Magistrate has important duties both executive and judicial cast upon him and the defendant was not, I think, performing any judicial duty in conducting the search of the plaintiff's premises for arms.

In these circumstances, I must hold that the search of the plaintiff's premises by and under the direction of the defendant was not warranted by law. The entry by the defendant into the plaintiff's premises being therefore a trespass, I have to consider before I determine what amount of damages I shall award to the plaintiff whether the defendant was actuated by malice or other improper motives.

It cannot be said in this case that the defendant had any feelings of hatred or revenge against the plaintiff with whom he was not acquainted. It has however been argued that the defendant had, in the unfortunate disturbances

which had arisen between the Hindus and Mahomedans at Jamalpur, taken the side of the Mahomedans and that the search on the 28th April 1907 was really conducted by the defendant owing to the improper feelings that he held against the Hindus at Jamalpur generally. In support of this it is alleged that as the defendant when he arrived at Jamalpur on the morning of April 28th was aware that the Mahomedans had previously announced by beat of drum that the Government had given them permission to loot the Hindus' property and marry their widows in *Nika* form and that a large number of the Hindus were fleeing from the place in a state of panic, if the defendant had honestly done his duty he would in the first place have tried to restore confidence to the Hindus by assuring them of the impartiality of the Government.

It may be that a man of wider experience or riper judgment would have done so, but even if I were to assume that this was the primary duty of the defendant this allegation against the defendant only comes to this, namely, that he committed an error of judgment. The defendant was severely cross-examined by the learned Counsel for the plaintiff and I am satisfied from what I have heard in this case that the defendant in determining upon the search that was made on the 28th April 1907 was acting *bond fide* and was not actuated by malice or other improper motives against any particular individual or section of the community.

But whilst I find that the defendant was not actuated by malice I cannot absolve the defendant with regard to one matter, namely, that the defendant failed to exercise proper supervision and control over the people under him conducting the search. Now what are the facts relating to the actual search itself? By the time the defendant and the searching party reached the plaintiff's cutchery, the cutcheries of three other zemindars and a Hindu temple had been previously searched without finding anything suspicious. In these circumstances one would have thought that the plaintiff would have then doubted whether the information given to him by the police was correct and would have proceeded with great circumspection, the more especially so, as he admits that at the search of one of the cutcheries previously searched a complaint had been made to him by a Hindu gentleman who was accompanying the search party as to the method in which the search was being conducted. What then are the facts relating to the actual search of the plaintiff's cutchery? The servants of the plaintiff (except one Safatulla, a Mahomedan, who had charge of the keys of the cutchery and who was not on the premises when the defendant and the search party arrived) having fled owing to the panic, it became necessary for the search party to break open the outer door of the cutchery. Having thus effected an entrance some of the Mahomedan mob which had collected and were accompanying the search party were requisitioned to go and bring *daos*, and assist in opening the boxes which contained the zemindary papers. That the search was conducted with unnecessary damage to the property of the plaintiff cannot to my mind be doubted for an instant. The papers out of various boxes in the cutchery were strewn haphazardly on the floor of the cutchery. Mr. Horniman of the "Statesman" newspaper who accompanied by Mr. Newman of the "Englishman" news-

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paper had been specially delegated to proceed to Jamalpur and report on the state of the disturbances at Jamalpur has graphically described the condition of affairs as he found them at the plaintiff's cutchery on May 1st. I am satisfied on the evidence that the state of affairs at the plaintiff's cutchery on May 1st was the same as it had been left on the conclusion of the search.

It is only fair, however, to the defendant to state that he had no previous experience in conducting a search and that he did not himself enter the cutchery, but relied on the police to conduct the search in a proper manner. But whilst this goes to establish the defendant's *bonâ fides*, it does not release him from the obligation the law casts upon him as being in supreme control of the search party from seeing that the search was conducted in a proper and reasonable manner.

Turning then to the question of damages, I am of opinion that the conduct of the defendant has not been such as the damages to be awarded should be exemplary. But whilst I think that the damages should not be exemplary, I also think that they must be substantial. I am unable to accede to the argument of the learned Counsel for the defendant that the damages in this case should be purely nominal.

Having given the matter the best consideration that I can, I think the justice of the case would be met if I order the defendant to pay to the plaintiff Rs. 500 as damages. The defendant must also pay to the plaintiff his costs of this suit on scale No. 2.

From this judgment the defendant, L. O. Clarke, appealed. There was a cross-objection in which the plaintiff reiterated his charge against the defendant of malice and want of *bonâ fides*: but the cross-objection was not pressed.

Mr. Dunne (*Mr. Gregory* with him), for the appellant. It is not intended to contest the *quantum* of damages, but it is submitted that the Court of first instance was in error in holding that the entry and search constituted an actionable trespass. The principles of common law, regarding trespass on which this suit was decided are not applicable to the present case. The alleged trespass having occurred in the District of Mymensingh, and the suit having come before the High Court in the exercise of its extraordinary original civil jurisdiction, the principles of justice and equity and the rule of good conscience should have been applied: see Letters Patent of 1865, section 20, also *Bhooni Money Dossee v. Natabar Biswas* (1). The Court of first instance found as facts, that the defendant had acted *bonâ fide*, and that the circumstances were actually such

as to justify the defendant as District Magistrate in making a search for arms. The mere technical omission to record his reasons cannot be held, in accordance with the principles of justice and equity and the rule of good conscience, to be sufficient to convert what would otherwise have been a justifiable act into an actionable wrong. To hold otherwise, would paralyze the action of Magistrates in moments of emergency. The entry and search were justifiable under section 25 of the Arms Act of 1878. The words in the section "having first recorded the grounds of his belief," when read in the light of the object of the section—the preservation of the public peace—must be taken to be directory and not imperative or mandatory: see Maxwell on the Interpretation of Statutes, 4th edition, page 556, and Craies on Statute Law, 4th edition, page 232, citing, *The Liverpool Borough Bank v. Turner* (1) and *Howard v. Bodington* (2). The District Magistrate was also protected in making the entry and search under the provisions of the Criminal Procedure Code. The search of the 28th April was not only a general search for arms, but also a search for the arms employed in the commission of the two offences on the 27th April. Under section 165 of the Criminal Procedure Code the District Superintendent of Police had full power to search the premises of the respondent for the arms with which the offences were committed as necessary for the conduct of the investigation into the offences. It follows that the appellant committed no actionable wrong in authorising the Superintendent to do that which the law gave him a right to do. Moreover, under section 4 of Act V of 1861, powers of general control and direction over the police within his local jurisdiction are given to the District Magistrate. Also under the Code the District Magistrate was competent to issue a search warrant, and he had power to direct or make the search under section 105 read with sections 94 and 96, although no proceeding was pending before him. Lastly the appellant was entitled to protection from suit under the Protection of Judicial Officers Act being Act XVIII of 1850. The search by the District Magistrate involved the exercise of

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(1) (1861) 30 L. J. 379, 380.

(2) (1877) L. R. 2 P. D. 203, 211.

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judicial discretion. It was as much a judicial act as the issue of a search warrant, and the issue of a search warrant has been held to be a judicial act: see *Mahomed Jackariah & Co. v. Ahmed Mahomed* (1) and *In re Lakhmidas Naranji* (2).

Mr. Garth (*Mr. A. Chaudhuri* with him), for the respondent. The Common Law of England has been held by Indian Courts to be the standard of justice, equity and good conscience: see *Waghela Rajsanji v. Sheikh Mastudin* (3). The search by the appellant was *prima facie* a trespass, and he would be liable in an action, unless he could justify the act as being warranted by law. Protection under section 25 of the Arms Act of 1878 can only be claimed for acts done in strict conformity with the terms in which the special power is conferred by the legislature. The provision "having first recorded the grounds of his belief" is imperative and mandatory: see Maxwell on the Interpretation of Statutes, 4th edition, page 556, and *The Queen v. Pindar* (4). Under section 165 of the Criminal Procedure Code, a search in the conduct of an investigation can be made only by a police officer and not the District Magistrate. Police officers are not within the control and jurisdiction of the District Magistrate, but of the Inspector-General. From section 105 of the Code, read with sections 94 and 96, it is clear that a Magistrate is not competent to issue a search-warrant, unless he is sitting as a Court, and there is some enquiry or proceeding pending before him: see *In re Harilal Buch* (5) and *Mouli Durzi v. Naurangi Ali* (6). In the circumstances of this case the Magistrate had no jurisdiction to issue a search-warrant or make a search. The appellant was not protected by Act XVIII of 1850, as the search was a purely executive and not a judicial act: see *Queen Empress v. Arumugam* (7) and *Chander Narain Singh v. Brojo Bullub Gooie* (8).

Mr. Dunne, in reply.

Cur. adv. vult.

- (1) (1887) I. L. R. 15 Calc. 109, 141.
(2) (1903) 5 Bom. L. R. 980, 982.
(3) (1887) I. L. R. 11 Bom. 551, 561.
(4) (1855) 24 L. J. Q. B. 148.

- (5) (1897) I. L. R. 22 Bom. 949.
(6) (1900) 4 C. W. N. 351.
(7) (1897) I. L. R. 20 Mad. 189.
(8) (1874) 21 W. R. 391.

MACLEAN C.J. The plaintiff is a zemindar residing in the District of Mymensingh. The defendant is a member of the Indian Civil Service, and, at the date of the transaction in question, was District Magistrate of Mymensingh. The plaintiff seeks to recover damages for a trespass alleged to have been committed by the defendant in searching the plaintiff's cutchery at Jamalpur on the 28th of April 1907. The defendant, in substance, pleads not guilty by Statute and relies upon the Statutes to which reference will be made later on.

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The facts appear to be these :—For sometime previous to the 28th of April 1907 the state of feeling between the Hindus and Mahomedans at Jamalpur ran very high, and there can be no doubt but that for some days the town had been in a condition of very great excitement. On the 28th of April 1907, the date of the search which undoubtedly took place on the afternoon of that day the defendant was at Mymensingh ; and in consequence of a telegram, which he received from Mr. Barnville, the Sub-divisional Officer, and Mr. Luffman, the Head of the Police at Jamalpur, he left for Jamalpur and arrived there at about 10 o'clock in the morning. He was then informed by Mr. Luffman that on the previous evening a man named Genda Sheikh had been wounded by a revolver shot ; and he was also informed that the police had reason to believe that fire-arms were stored in the cutcherries of the zemindars. In consequence of this information the defendant determined to search, amongst others, the plaintiff's cutchery ; and in the presence of certain gentlemen as witnesses of the search and accompanied by Mr. Barnville, Mr. Luffman and several police, he searched the plaintiff's cutchery in the afternoon. This is the trespass complained of. It is unnecessary to go more in detail into the facts of this part of the case, because there is no dispute as to the facts stated above. The fact of the search and that it was conducted by the order and under the directions of the defendant is not denied. It seems, therefore, unnecessary to discuss what took place on the evening of the 27th of April or to go more minutely into the question of the excitement or the cause of the excitement and

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the state of feeling between the Hindus and Mahomedans at that time. Unless the search were warranted by some Statute, the defendant had no right to make it; and the question we have to decide is whether the defendant is protected, in other words, was he acting and did he act under any, and if so, what power conferred upon him by law. The plaintiff has charged the defendant with having acted maliciously and without reasonable and probable cause in making the search. I have no hesitation in saying that there is no ground whatever for charging the defendant with malice, nor any hesitation in saying that the defendant acted in perfect good faith in making the search that he did.

It will, perhaps, be convenient, in the first place, to deal with section 25 of the Indian Arms Act, 1878, upon which the defendant relies. That section runs as follows:—"Whenever any Magistrate has reason to believe that any person residing within the local limits of his jurisdiction has in his possession any arms, ammunition or military stores for any unlawful purpose or that such person cannot be left in the possession of any such arms, ammunition or military stores without danger to the public peace, such Magistrate, *having first recorded the grounds of his belief*, may cause a search to be made of the house or premises occupied by such person or in which such Magistrate has reason to believe such arms, ammunition or military stores are, or is, to be found, and may seize and detain the same, although covered by a license in safe custody, for such time as he thinks necessary. The search in such case shall be conducted by, or in the presence of, a Magistrate, or by, or in the presence of, some officer specially empowered in this behalf by name, or in virtue of his office, by the Local Government." The search was undoubtedly a general search for arms, not, as is now suggested at the Bar, for the revolver, with which Genda Sheikh had been wounded. It is conceded that the defendant before making the search did not *record the ground of his belief*. The question then is whether, not having complied with the terms of the Statute, the defendant can justify the search under that section. It is contended for him that the words "having first

recorded the grounds of his belief," are merely directory and not imperative or mandatory. It is difficult to accept this view. A special and drastic power is by this section granted to the Magistrate. Without it, he could not have made the search, unless, as it is suggested, certain provisions of the Criminal Procedure Code apply to a case such as the present. These words must have been inserted in the section with an object and the object probably was to protect the public against searches being inconsiderately directed and to insure the exercise of deliberation by the Magistrate before he ordered the search. A fine distinction is often drawn between what is *mandatory* and what is merely *directory* in the language of any particular Statute. The present case appears to fall within that class of cases in which, when a Statute creates a special right, but certain formalities have to be complied with antecedent to the exercise of that right, a strict observance of the formalities is essential to the acquisition of the right. As the defendant, in the case now before us, did not comply with the required formality by recording the grounds of his belief before he proceeded to search, this section does not appear to protect him from the consequences of his action.

Then it is said that the search was warranted by section 105 of the Criminal Procedure Code. That section runs as follows : "Any Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search-warrant." The Magistrate can only act under this section where he is competent to issue a search-warrant. That takes us to section 96. That section applies to the issue of a search-warrant by the Court. Here the defendant was not acting as a 'Court,' and, all that section 105 enacts is, that instead of the Court issuing a search-warrant, the Magistrate may direct a search to be made in his presence. It is reasonably obvious why this power is given to a Magistrate : but the section does not assist the present defendant.

Then, reliance is placed upon section 165 of the same Code, and the argument is that, inasmuch as Mr. Luffman might have made a search under that section, the search must be

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treated as having been made under that section, and the defendant can so shelter himself. The answer to this contention seems to be that the search was not, and was never, intended to be a search under this section, and the search was not by Mr. Luffman or by any police officer making an investigation: it was a search conducted by, and under the directions of, the Magistrate. Mr. Clarke says so himself. He says "I thought I was justified in making the search myself" and "I did want to make the search myself." It must, I think, be taken that the search was by him. Mr. Luffman was not called to prove that this was a search under this section, or that he was exercising the powers conferred upon him by this section. Mr. Luffman did not go into the box. Section 165 does not mention the Magistrate. Where there are special provisions in an Act of the Legislature dealing with the case of a search for Arms, and laying down what are the conditions precedent to making such a search, and there are general provisions in another Act of the Legislature dealing with searches generally, and in point of fact the search is one made for arms, it ought, in the absence of evidence, to show that the search was made under the general as opposed to the specific legislation, to be taken that the search was made, not under the general provisions authorizing searches, but under the special provisions authorizing a search for arms, and especially so when the search is made by one who, in the circumstances had no power of search under the general provisions as to searches. Nothing is specifically said about arms under section 165, and that section does not appear to protect the defendant.

The scheme as regards searches under the Code of Criminal Procedure is reasonably clear. The Court can issue a search warrant under section 96, or in lieu of that the Magistrate may himself search under section 105; section 165 deals with searches by a police officer, and not by a Magistrate.

The only other Act relied upon is Act XVIII of 1850. The preamble of that Act is "for the greater protection of Magistrates and others acting *judicially*" and there is only one section which runs as follows:—"No Judge, Magistrate, Justice

of the Peace, Collector or other person acting *judicially* shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction : provided that he, at the time in good faith, believed himself to have jurisdiction to do or order the act complained of and no officer of any Court, or other person bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court for the execution of any warrant or order, which he would be bound, to execute, if within the jurisdiction of the person issuing the same." Can it be said that in conducting this search, the Magistrate was acting *judicially*? Was this act done in the discharge of his *judicial* duty? The Act itself draws a distinction between an executive as opposed to a judicial act : for it protects not only the person who acts judicially, but also the person who executes the order of the person so acting judicially. The duties of a Magistrate in this country are at once *judicial* and *executive*. But here the search must be taken to have been conducted by the Magistrate in his *executive*, and not in his *judicial*, capacity. There is, therefore, no Statute which protects the Magistrate in his *prima facie* wrongful act in trespassing upon the plaintiff's cutchery.

I should have been glad if I could have seen my way to have protected the Magistrate, for he was placed in a difficult position and in one of emergency. That he acted with the utmost *bonâ fides* throughout, I entertain no doubt whatever, and the charge of malice against him is as unfounded as it is improper. The only mistake he made was in not complying with the provisions of the Arms Act before he made the search. We are told that if the decision of the first Court be upheld, it will paralyze the action of Magistrates, in moments of emergency, in this country, and that they will be timid about acting under their statutory powers. I am afraid we cannot go into the consequences of our decision ; our only duty is to decide, as best we may, according to what we believe to be the Law. At the same time it may be pointed out that it is of the highest

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importance, in the interests of the public, that when Executive Officers are invested with statutory powers of a special and drastic nature, they ought to be very cautious, before exercising those powers, in satisfying themselves that they have strictly complied with the provisions of the Act which created them.

It is said that we must decide this case, not according to the Law of Trespass prevailing in England, but upon the principles of equity, justice and good conscience. But how can those principles justify an Executive Officer of the Government in forcibly entering another man's house and ransacking its contents without any warrant in law to do so ? In the view taken it becomes unnecessary to go into the question of whether the search was properly conducted or whether too much violence was or was not displayed, for, at the outset Mr. Dunne said that he did not propose to go into question of the *quantum* of damages.

There is a cross-objection in which the plaintiff re-iterated his charge against the defendant of malice and want of *bonâ fides*. This cross-objection has not been pressed.

The result then is that the appeal is dismissed ; but having regard to the re-iteration of the unfounded charges against the defendant, it will be dismissed without costs, and the cross-objection will also be dismissed without costs.

This judgment will govern the next appeal No. 37 of 1908 and the same order will be made in that case.

HARINGTON J. In this case the defendant appeals against a judgment of this Court in its original jurisdiction awarding to the plaintiff Rs. 500 damages for trespass.

The defendant was in April 1907 District Magistrate of Myensingh : on the 27th of that month—there being very considerable ill-feeling between the Mahomedans and Hindus—a Mahomedan was shot at Jamalpur. On the 28th the defendant arrived at Jamalpur and was informed of the shooting of the Mahomedan and that fire-arms had also been used by some

Hindus in the temple of one Doya Moyee. He was told that the person, who had shot the Mahomedan, had fled towards the plaintiff's cutcheries and he was told that the zemindars were storing arms in their cutcheries.

Under these circumstances, on the 28th the defendant went to the plaintiff's cutchery accompanied by the District Superintendent of Police and other persons, who conducted a search under the authority of the defendant.

In respect of this search the plaintiff claimed damages to the extent of Rs. 10,500.

There was some evidence of actual damage done by the persons, who carried out the search apart from the mere trespass. This evidence the persons who made the search were not called to contradict. The Judge, therefore, after acquitting the defendant of any want of *bonâ fides* in the matter awarded the plaintiff Rs. 500 to cover the trespass and the actual damage done.

The learned Counsel for the appellant does not concern himself with the amount of damages, but argues that the defendant is justified under the statutory enactments on which he relies.

The Acts which the defendant considered himself entitled to rely on were the Arms Act and the Criminal Procedure Code. In the course of the argument there was some discussion as to which of these Acts the defendant purported to act under.

That to my mind is of very little importance. The defendant is entitled to call in aid any Statute which justifies his action quite irrespective of whether it was present or not to his mind, when he made the search.

Under section 25 of the Arms Act a Magistrate is authorized, if he thinks a person has arms for an unlawful purpose, to make a search, *having first recorded the grounds of his belief*.

It is admitted that the defendant did not record the grounds of his belief in this case, but it is argued that the provision that he should do so is merely directory, and that his entry on the premises is justified as he had good grounds for his belief that arms were stored in the cutchery notwithstanding his failure to record these grounds.

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I do not agree with this, and I think that where a Statute authorizes the doing of an act, which is *primâ facie* a wrong to an individual, the doer must comply strictly with the conditions imposed by the Statute, if he desires to rely on the Statute as a justification for his act. He cannot claim as against the individual, who is injured by his act, the protection of the Statute, unless he strictly complies with the conditions, on which the Statute affords that protection.

Here the section imposes on the Magistrate in the most express terms the duty of first recording the grounds of his belief that arms are in the possession of the person, whose house is to be searched. It makes it in the most express terms a condition precedent and to justify his entry the condition must be strictly complied with. As there was a failure to comply with this condition the Arms Act will not avail the defendant.

The next section, under which it is sought to justify the appellant, is section 165 of the Criminal Procedure Code. That section provides that "whenever a police officer making an investigation considers that the production of anything is necessary for the conduct of an investigation of any offence, which he is authorized to investigate, and when such thing is not known to be in the possession of any person, such officer may search or cause the search to be made for the same within the limits of the station, of which he is in charge or to which he was attached."

I quite agree with the argument that (apart from any question of the user of undue violence), if the search by the police officer can be justified under this section, then the defendant must succeed, for, if the police officer committed no trespass in entering and searching, then the defendant committed no wrong in authorizing the police officer to do that which the law gave him a right to do.

But this case was not set up in the Court of first instance nor was any evidence given to support it. To succeed the defendant would have to prove that the police officer, who made the search, considered that the production of something was necessary for the conduct of his investigation into an offence, which

he was authorized to investigate, and this could not be proved without calling the police officer.

Now the police officer was not called, the facts entitling the police officer to enter and search were not proved. As the case stands there is nothing to show that the police officer considered that it was necessary to any investigation to produce anything. For all that appears he may have searched, just because the defendant told him to.

The next section relied on is section 105 read with the other section dealing with the issue of a search-warrant.

The defendant considered he was able to issue a search-warrant and therefore under section 105 competent to conduct a search in person.

Now the law relating to the issue of search-warrants is to be found in section 96 and the following sections of the Criminal Procedure Code.

By section 96, when the Court considers that the purposes of any enquiry, trial or other proceeding under this Code will be served by a general search, it may issue a search-warrant and by section 105 a Magistrate can direct a search to be made in his presence of any place, for which he is competent to issue a search-warrant.

Could he in the present case issue a search-warrant ?

In my opinion section 96 only authorizes the Magistrate to issue a search-warrant when sitting as a "Court," i.e., when some proceeding under the Code has been initiated before him and this view is strengthened by the form of the search-warrant given in schedule V, Form 8, which recites that information has been laid or complaint has been made. In this case there is no evidence of the initiation of any proceeding before the Magistrate under the Criminal Procedure Code nor of any "information" or a "complaint" being laid before the Magistrate under the Code. Moreover the Magistrate appears to have been searching for arms generally, not for some particular weapon.

As I read the provisions of the Code it appears to provide for search by a police officer, which may be made under section 165 before any proceeding has been initiated before any Court

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and searches under the authority of a Court under section 96, which must be made after the initiation of some proceeding. The only sections that I can find in the Code authorizing a Magistrate to search without any proceeding having been initiated before him, are sections 98 and 100. The former confers on a District Magistrate, Sub-divisional Officer, Presidency Magistrate or Magistrate of the 1st class the power of issuing a warrant or to search houses suspected of containing stolen property, forged documents, counterfeit coins and such like articles, but this power can only be exercised upon information and after such enquiry as the Magistrate thinks necessary. The latter enables a Presidency Magistrate, Magistrate of the first class or Sub-divisional Magistrate, if he has reason to believe that a person is confined under such circumstances that the confinement amounts to an offence, to issue a warrant for the search for the person so confined. It is significant that section 96 which authorizes the issue of a search-warrant for the purposes of an enquiry, trial or other proceeding under the Code confers the powers of issuing the warrant on "the Court," while sections 98 and 100 confer the power of issuing a warrant to search only on the Magistrate specified in the section.

Lastly, it is said, that the defendant was acting as a judicial officer and so is protected by the Act of 1850.

That Act in my opinion does not apply because there is nothing to show that the Magistrate was acting judicially, when he directed the search.

No doubt there is authority for saying that the issue of a search-warrant by a Magistrate is a judicial act. Under the Code (except in the cases specified under sections 98 and 100) the issue of a search-warrant presupposes the existence of an enquiry trial or other proceeding in the course of which the Court may be called on to determine judicially whether a warrant ought or ought not to be issued. But even if it be assumed that a search by the Magistrate under section 105 is as much a judicial act as the issue of a warrant to search (a proposition to which I am not at present prepared to assent) even then it has not been shown that the search was directed for the purpose

of any proceeding under the Code, as it must be to justify the issue of a warrant. And further, if the Magistrate were acting as a judicial officer, I should have expected some sort of record of some proceeding before him in the course of which it would appear that the search was directed. On the contrary, it appears that there was nothing before the Magistrate to enable him as a Court to issue a warrant.

He cannot therefore be said to have been acting judicially in directing a search to be made without any proceeding having been instituted before him, which he could be called on to determine judicially.

In conclusion, if there had been no evidence of excess of violence in the conduct of the search, I should have considered that a very small sum indeed would have represented the damage, which the plaintiff would be entitled to recover for the wrong, which the defendant has done him in making a search, which he had ample reasons for making without recording those reasons. But there was evidence of undue violence in the conduct of the search—not perhaps very strong or very convincing evidence, but it was believed by the learned Judge who had the witnesses before him and I cannot say there was no case to answer on this head. But the defendant did not answer it by calling the actual searchers the persons who were alleged to have done the damage and that being so the damages were bound to be more than nominal.

For these reasons, I agree that the appeal should be dismissed and that the respondent should be allowed no costs, inasmuch as he has made grossly improper and unfounded attacks on Mr. Clarke, who when called upon to act under circumstances of unusual difficulty, undoubtedly acted with perfect good faith.

BRETT J. I regret that, after the best consideration which I have been able to give to the facts and law of this case, I am unable to agree with the view which has been taken in their judgment by the learned Chief Justice and my learned brother Mr. Justice Harington.

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The present appeal arises out of a suit brought by the plaintiff, Babu Brojendra Kishore Roy Chowdhry, a zemindar in the District of Mymensingh, who has his zemindari cutchery at Jamalpur in that District, against Mr. L. O. Clarke, who on the 28th April 1907, was District Magistrate of the Mymensingh District. The suit was brought to recover damages to the amount of Rs. 10,500 for wrongful trespass in the cutchery of the plaintiff by the defendant on the 28th April 1907. The plaint alleged that on the 28th April the defendant with the Sub-divisional Officer of Jamalpur, Mr. Luffman, District Superintendent of Police, a Sub-Inspector of Police and the Sub-Registrar followed by a large number of armed police men and a large number of Mahomedan rowdies carrying lathis and other dangerous weapons wrongfully invaded and trespassed in the plaintiff's cutchery, and there, under orders of the defendant, those who accompanied him forcibly, wantonly and wrongfully broke open and smashed boxes in the cutchery, scattering, destroying and mutilating various valuable zemindari papers and documents. It went on to say in paragraph 6 that "the defendant acted in a whole illegal, wanton and arbitrary manner and he had no lawful or reasonable excuse or justification or authority in or for his wanton and high-handed conduct aforesaid, and the plaintiff further charges that the defendant acted wrongfully and maliciously and without reasonable cause in the matter of the conduct aforesaid." Damages were claimed (see paragraph 7 and the schedule) (1) for insult, injury and humiliation at Rs. 8,000, (2) for damages done to the houses at Rs. 200, (3) damages to moveables at Rs. 300 and (4) damaged or lost papers and documents at Rs. 2,000. Under the 1st item appears to have been included a claim for rents, which in consequence of the search the plaintiff said he had been unable to realise from his tenants.

The suit was instituted on the 25th July 1907 in the Court of the Subordinate Judge (3rd Court) of Mymensingh. On the 26th November 1907, the defendant applied to the District Judge of Mymensingh for the transfer of the suit for trial from

the Court of the Subordinate Judge to that of the District Judge. After receipt of notice of the application the plaintiff, on the 3rd January 1908, applied to the High Court in its extraordinary civil jurisdiction to transfer the suit from the Court of the Subordinate Judge of Mymensingh to the High Court for trial and on the same day a rule *nisi* was issued by the High Court on the defendant to show cause why the suit should not be transferred to the High Court for trial. On the 29th January 1908, an order was passed by Mr. Justice Fletcher transferring the suit to the High Court to be tried by it in the exercise of its extraordinary original jurisdiction. The suit afterwards came on for hearing before Mr. Justice Fletcher on the 25th May 1908.

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The following sequence of events is important:—

On the 21st April 1907, there was a large fair or *mela* held at Jamalpur. Certain Hindus at the instigation, it is stated, of the Hindu servants of the plaintiff and other zemindars, his co-sharers in the village, tried to prevent the sale of *bideshi* or foreign goods at this fair. The Mahomedans resented this and there was a serious disturbance and the feelings of the Mahomedans towards the Hindus were considerably embittered. In the evening of the 27th April some Hindus dressed, it is stated, in Mahomedan clothes, were seen wandering about and were followed by some Mahomedans. The Hindus turned on the men following them and fired 3 or 4 revolver shots at them, one of which wounded Genda, a Mahomedan. An uproar followed, Mr. Barnville, Sub-divisional Magistrate of Jamalpur, and Mr. Luffman, District Superintendent of Police, who were then in the D k Bungalow at Jamalpur, went to the scene of disturbance and met some Mahomedans carrying away the Mahomedan Genda, who had a wound from a revolver bullet in his leg. Information was given to them that Genda had been wounded by one Prakash Chander Dutta, a leader of a body of Hindus called Volunteers and that Prakash Chander Dutta and those with him had fled in the direction of the cutcheries. The cutcheries of the plaintiff and his co-sharer landlords appear

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from the map filed in the suit to be all close together on an open piece of ground. Close by is the temple of Thakurani Doya Moyee. An excited crowd of Mahomedans armed with lathis were collecting evidently bent on attacking the cutcheries. The two officers collected as many police as they could, but went towards the cutcheries with apparently the double intention of arresting the man or men, who had fired on the Mahomedans and wounded Genda and also of keeping the Mahomedan mob under control. On arrival at the cutchery they found four Hindu strangers there, whom they arrested on suspicion. They also found Satish Chandra Banerjee with forty or fifty men armed with lathis in the cutchery. These they disarmed. They were then informed that armed men were concealed in the adjoining temple of Doya Moyee and went there. They found the door locked and were refused admission. The Sub-divisional Magistrate ordered the persons inside to open the door, promising that no harm should be done to the persons inside. There was then a large angry crowd of Mahomedans close by, but they seem to have been under control. The door was not opened, but two shots from a revolver and two from a shot gun were fired from inside the temple and a Mahomedan received a shot wound. The two officers then drew off the Mahomedan crowd and managed to disperse them.

The Sub-divisional Officer, Mr. Barniville, then wired to the Commissioner of the Division for all available armed police, and the District Superintendent of Police, Mr. Luffman, sent a telegram to Mymensingh to the defendant as District Magistrate to the following effect "serious riot just averted—come at once."

The defendant received this telegram at 2 A.M. on the morning of the 28th April. He afterwards started for Jamalpur and arrived there at 10 A.M.

On his arrival the defendant received from Mr. Barniville, the Sub-divisional Magistrate, and from Mr. Luffman, Superintendent of Police, reports of the two occurrences of the 27th April.

At 1-30 P.M. the defendant with Mr. Luffman, the District Superintendent of Police, proceeded to search the cutcheries of the plaintiff and of the other zemindars. The temple of Doya Moyee and the cutchery and Naib's house of the Ram Gopalpur zemindar were first searched. Afterwards the cutchery of the plaintiff was searched. The case for the defendant was that he searched the plaintiff's cutchery in consequence (1) of the reports received by him from Mr. Barniville, and Mr. Luffman of what had occurred on the 27th April, and (2) of the reports previously received that the Gouripore zemindars (*i.e.*, the plaintiff and his co-sharers) had been collecting arms and men in their cutcheries.

At that time none of the *amlahs* or *peadahs* of the plaintiff were to be found and it seems that the Jemadar in charge of the plaintiff's cutchery building had locked it up and left at 1 P.M. The padlocks closing the doors of the building were forced open and the boxes in the cutchery were also forced open and their contents—zemindari papers—taken out in pursuit of the search for arms. The search of all the buildings occupied from 1-30 P.M. to 3-30 P.M.

The main points raised for determination in the suit were (1) was the search made under the provisions of the Code of Criminal Procedure and was the defendant protected from the suit on that account, (2) was the search made under the provisions of the Arms Act and was the defendant protected from suit by that Act, or (3) was the defendant in directing the search acting judicially and were he and those acting under his orders in consequence protected by the provisions of Act XVIII of 1850 ?

In his defence the defendant pleaded (see his written statement, paragraphs 13, 14 and 15 and the preceding explanatory paragraphs 6 to 12) (1) that at the time of the alleged trespass he was District Magistrate of Mymensingh, and as such Magistrate he was acting and did act under and by virtue and in pursuance of the powers conferred on him by law and particularly by all or some one or more of sections 94, 96, 105 and

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165 of the Criminal Procedure Code or (2) in the alternative that he was acting under the powers conferred upon him by section 25 of the Indian Arms Act, or (3) in the alternative that he was acting in discharge of a judicial duty and within the limits of his jurisdiction and that he at the time believed himself to have (as he submits he had in fact) jurisdiction to do or order the acts done or ordered by him and therefore that he was protected by Act XVIII of 1850, being the Act for the Protection of Judicial Officers. Further, he alleged that the damages claimed were excessive. The written statement, it is to be observed, was filed in the Court of the Subordinate Judge of Mymensingh on the 9th November 1907.

Evidence was gone into by both parties and judgment was delivered by Mr. Justice Fletcher on the 19th June 1908. The learned Judge held that the defendant in determining to make the search on the day in question in the plaintiff's cutchery was acting *bonâ fide* and was not actuated by malice or other improper motives against any particular individual or section of the community. On the other hand, he held that the search of the plaintiff's premises by the defendant was not warranted by law and so constituted an actionable trespass. In arriving at this conclusion the learned Judge applied the principle of the Common Law in England, which he regarded as applicable to the case, that a Magistrate is liable in an action for trespass for acts done by him to the person or property of others, unless he can justify the act as having been done under the authority of law, and that if a Magistrate pleads a Statute or Statutes as justifying his acts, he must bring himself within the words of the Statutes strictly.

Applying that principle he held that the defendant had failed to justify his act under the Arms Act of 1878, as the provisions of section 25 of that Act require that before causing a search to be made under the Act, the Magistrate should first record the grounds of his belief that the person, whose premises he was about to search, had in his possession any arms, ammunition or military stores for any unlawful purpose or that such person cannot be left in the possession of any such arms,

ammunition or military stores without danger to the public peace and the defendant had failed to record the grounds for his belief to that effect before he directed the search.

Dealing next with the plea based on the provisions of sections 105 and 106, Criminal Procedure Code, the learned Judge dismisses it very summarily with the observation that it is obvious that the defendant was not competent to issue a search warrant under the provisions of the Code of Criminal Procedure, as he was not acting as a Court within the meaning of section 94 of the Criminal Procedure Code, as there was no proceeding pending before him.

He then takes the plea based on the provisions of section 165 of the Code of Criminal Procedure that the search was in fact one made by Mr. Luffman, the District Superintendent of Police, who at the time was making an investigation into the offence committed by the person, who shot at and wounded Genda on the 27th April 1907 and that as Mr. Luffman as a police officer had authority under section 165 of the Code of Criminal Procedure to make the search in the course of that investigation, the defendant, having taken Mr. Luffman to make the search, was protected by the law in the same way as Mr. Luffman. As to this the learned Judge says that he was satisfied on the evidence that the search was not intended to be made under the provisions of that section, but was a search for arms generally, which section 165 does not authorise and therefore he held that section 165 of the Criminal Procedure Code did not justify the action of the defendant. It is unfortunate that the learned Judge does not specify the evidence, on which he relied in support of this conclusion.

Further, he held that the provisions of Act XVIII of 1850 could not be invoked to protect the defendant, because he was of opinion that in directing and conducting the search the defendant was performing no judicial duties at all. It is to be noticed that the judgment gives no distinct reasons for the opinion that the act was not a judicial act, but that it was "one of the important executive acts, which as District Magistrate the defendant had to perform."

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On these findings the learned Judge arrives at the conclusion that the search of the plaintiff's premises by and under the direction of the defendant was not warranted by law and therefore amounted to a trespass.

In dealing with the question of damages the learned Judge holds that the defendant did not himself enter the cutchery to make the search, but relied on the police to conduct it in a proper manner, and that, though this goes to establish the defendant's *bonâ fides* it does not release him from the obligation, which the law casts on him as being in supreme control of the search party, from seeing that the search was conducted in a proper and reasonable manner. He entertains no doubt that the search was conducted with unnecessary damage to the property of the plaintiff, relying apparently in support of this view mainly on the evidence of Mr. Horniman, and holds that the defendant failed to exercise proper supervision and control over the people under him conducting the search. Being of opinion on this finding that though the damages should not be exemplary they should be substantial, he awards that plaintiff Rs. 500 as damages against the defendant.

The defendant has appealed.

The learned Counsel for the appellant, who has placed the case before us, has laid great stress from the outset on the remarkable contrast which is presented by the case as held by the learned Judge to have been proved against the defendant and that as set out in the plaint, and has argued that the acts of the defendant and those, who carried out his orders, have been grossly distorted and the damage done exaggerated enormously. No attempt was in fact made to prove the alleged loss of rents from the tenants as a damage consequential on the search, after the plaintiff's agent had been obliged to admit that in the preceding year an attempt had been made by the plaintiff to raise the rents of his tenants, more than 90 per cent. of whom are Mahomedans, which had been resisted and had created general discontent. The plaint averred against the defendant that he had committed a

malicious and outrageous abuse of his authority. The learned Judge has found that the defendant acted *bonâ fide* and without malice, but that as he had failed to comply strictly with the provisions of section 25 of the Arms Act he committed a trespass.

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The first point taken in support of the appeal is that the learned Judge erred in regarding the principles of the Common Law of England as applicable to the present case. The learned Counsel has pointed out that the alleged trespass having been committed in the District of Mymensingh, which is outside the limits of the ordinary civil jurisdiction of the High Court and the suit having been transferred to the High Court for trial in the exercise of its extraordinary civil jurisdiction, the learned Judge was bound under the provisions of section 20 of the Letters Patent of 1865, with respect to "the law or equity and the rule of good conscience" to be applied to the case, to apply "the law of equity and rule of good conscience," which would have applied to the case in the local Court of 3rd Sub-Judge of Mymensingh. This contention cannot be denied and clearly the principles of English Common Law could not be taken to apply as such. The learned Counsel for the respondent in reply has, however, invited [attention to the decision in the case of *Waghela Rajsanji v. Sheikh Masludin* (1) as practically laying down that the same principles would apply. But the learned Judge in dealing with the point which arose in that case and which was whether a guardian could execute a contract in the name of his ward, so as to impose on the ward a personal liability, remarks that a guardian in India could not have greater powers over a ward than a guardian in England, and adds that the matter must be decided by equity and good conscience which is generally interpreted to mean the rules of English Law, *if found applicable to Indian society and circumstances*. This clearly lays down that the principles would only apply, if found applicable to the circumstances of the case under consideration. In the present case the learned

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Counsel for the appellant has pointed out that the learned Judge has found that the circumstances were such as to justify the defendant as District Magistrate in making the search for arms, and that he acted throughout with perfect *bonâ fides* and the learned Counsel contends that the mere omission on the part of the defendant to record his reasons for directing the search, though the reasons in fact existed and were good and sufficient, cannot be held in accordance with the principles of law, justice, equity and the rule of good conscience as governing the district Courts in India, to be in law sufficient to convert what was a right and justifiable act into an actionable wrong.

In this case, however, before attempting to apply the principles, on which the learned Counsel relies, it would be convenient first to see whether in the circumstances of the case the defendant has been able to justify his act on his pleas.

The facts leading up to the search have been already set out in detail.

The learned Judge in the Court below has stated in his judgment that he was satisfied on the evidence that the search was made for arms generally under the provisions of the Arms Act and not under any sections of the Code of Criminal Procedure, and the first question, which arises, is—Does the evidence support that finding?

On this point we have the evidence of the defendant alone and we have his defence as set out in the written statement. The method adopted in cross-examination of the defendant is, to say the least of it, unusual. By means of a long series of questions many of which on the spur of the moment and without reference to authorities, it was manifestly most difficult for him to answer and in reply to which it is admitted that it would be unfair to bind him by his answers, the learned Counsel appears to have attempted to argue out with the defendant points of law, which it was certainly the duty of the Judge trying the case to decide. What, however, does the defendant say? In his written statement he first claims protection on the ground that he was acting as a Magis-

trate under the provisions of sections 94, 96, 105 and 165 of the Code of Criminal Procedure. None of these could possibly apply to a search under the provisions of the Arms Act. It is equally a matter, which admits of no doubt, that if the search was made for arms used in the commission of an offence, and for the purpose of an enquiry or an investigation into that offence, the provisions of the Arms Act could have no possible application. That Act in section 25 provides for a search for arms and ammunition generally for the preservation of the public peace and not for weapons used in the commission of a definite offence.

To support the defendant's assertion that he acted under the provisions of the Code of Criminal Procedure, we have the following statements. In examination-in-chief he was asked "why did you make the search," and he gave the following reply :—

"I had received reports for some time that certain zemindars, in special the Gouripore zemindars, had been collecting arms and men in their cutcheries. The Mahomedans of Jamalpore stated that they feared the Hindus would sally out from their cutcheries and do them injury again as soon as the officials had left. A case had been instituted with regard to the shooting of a Genda Sheikh and it was proposed to institute cases for the shooting on the Sub-divisional Officer and Superintendent of Police. For the purpose of these cases it was all important that the weapons, with which the shooting was done, should be found. It was also very dangerous to leave it unascertained whether there was not a considerable store of arms in those cutcheries." The following answers were elicited from him in his cross-examination (at pages 108 to 114 of the paper-book). "Before this search I did refer to the Criminal Procedure Code: I did not refer to the Arms Act." Further on he says, "I thought I could act under section 105" and then he was stopped; and later on, in answer to a question relating to his power to act under section 165 of the same Code, he says "in this way I

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thought I could act under section 165. The Sub-Inspector of Police was empowered to make a search and I thought I could be present and direct the proceedings. Then I would be acting as an Executive Officer of the Police." When questioned as to his power to direct the search under section 94 and section 96 of the Criminal Procedure Code, he says that he thought, he could issue a search-warrant under section 96 of the Criminal Procedure Code though afterwards he says "There was nothing formal in my inquiry." "No, I was not holding any inquiry as a Magistrate." Afterwards in reply to the question "you wanted to search in order to preserve the peace of the district," he says "That was one of the reasons: one of the reasons was to seize arms to prevent their being used. My search for the arms in connection with that case was equally in my mind. The actual investigation of that case was in the hands of the District Superintendent of Police." At page 115, he further says in answer to a question from the Court "I made up my mind to make the search after hearing the police officers' and the other persons' reports."

The fact that the defendant before directing the search referred to the Code of Criminal Procedure and not to the Arms Act, seems to be consistent rather with the conclusion at least that in his own mind at the time the defendant thought he was acting under the Code of Criminal Procedure and not under the Arms Act, and to support a conclusion contrary to that, at which the learned Judge has arrived, that the search was only for arms generally. They seem fully to support the conclusion that the search was at the same time for arms used in the commission of the two offences, which were alleged to have been committed on the 27th April, when fire-arms were certainly used.

The learned Judge has not referred to the evidence, on which he relied and, after a careful perusal of the defendant's evidence and of his written statement, filed on the 9th November, immediately after the institution of the suit, I regret, that I am unable to agree that the conclusion of the learned Judge is in fact supported by the evidence.

The question then arises for determination, whether the defendant was justified in directing the search by the provisions of the Code of Criminal Procedure.

First it is to be considered whether the defendant had power to act under the provisions of section 105 read with the provision of sections 94 and 96 of the Code. These sections occur in Chapter VII which falls within Part III of the Act, which is headed "General Provisions." That these provisions apply to proceedings before and after the proceedings in prosecution of an accused is clear from the sections themselves. They do not necessarily apply to proceedings after a case has been instituted against any definite accused person. Section 94 runs: "Whenever any Court or in any place beyond the limits of the towns of Calcutta and Bombay any officer in charge of a Police station considers that the production of any document or other thing is necessary or desirable for the purpose of any investigation, enquiry, trial or other proceeding under this Code by or before such Court or officer, etc." An investigation by a police officer or any inquiry by a Magistrate may be made before any accused person has in fact been named.

The learned Judge has held that the defendant was not acting as a "Court" within the meaning of section 94 of the Criminal Procedure Code, as there was no proceeding pending before him. "Court" is nowhere defined in the Code nor is "a proceeding." From Chapter III of the Code it would, however, appear that the term "Court" and "Magistrate" are in fact synonymous and it should be remembered that under the special conditions prevailing in India a Magistrate is frequently called upon to act as a Court, even though he may not at the time be sitting within the four walls of his ordinary Court building or in fact any building. The powers of the Court depend on the power with which the Magistrate presiding in it is vested. "Proceeding" appears to mean anything done or order passed by the Magistrate or Court in the exercise of his powers. This indeed seems clear, for instance from

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the word "proceeding" as used in sub-section 7 of section 145 of the Criminal Procedure Code. Powers to act under section 94 and section 96 of the Code are given to all Magistrates (see section 94 itself and schedule 3 of the Code) and the question is whether a Magistrate can exercise those powers on verbal information only or whether it is necessary for him to wait till something has been written or he is sitting in Court before he can do so. The learned Judge seems to be of opinion that this preliminary is essential. But is it so? Offences are divided into two broad classes (1) Cognizable, *i.e.*, those for which a police officer may arrest without a warrant from a Magistrate and (2) Non-cognizable, *i.e.*, those in which a police officer may not arrest without a warrant. The former seems to mean cases of which a police officer, as such, can take cognizance and the latter, those of which as such he cannot take cognizance. Section 190 of the Criminal Procedure Code lays down the conditions under which a District Magistrate or other Magistrate referred to in that section may take cognizance of an offence. It must be remembered that the defendant in this case was at the time of the search the District Magistrate of Mymensingh. He had therefore power under the law throughout the whole District to take cognizance of the offences with fire-arms, which are alleged to have been committed on the 27th April. And he would be empowered to take cognizance under that section on (a) complaint, (b) police report of such facts and (c) on information received by any person other than a police officer or upon his own knowledge or suspicion that such an offence has been committed. There is nothing in the section to lay down strictly that either (a), (b) or (c) must be written, and in fact the latter portion of clause (c) would favour the contrary view. Nor is there anything in the law which strictly lays down that the police officer must have something written before he can take action in respect of an offence, of which he can take cognizance without the order of the Magistrate. Clearly in India as well as in England a police officer must often take cognizance of an offence and arrest the offender on verbal

information alone. There seems to be nothing in the law or in common sense to prevent a Magistrate from acting on verbal information and taking cognizance of an offence and taking the steps necessary to arrest the offender or, as in the present case, to secure the production of the weapon with which an offence has been committed. Manifestly there are cases when the offender would escape or material evidence would disappear, if a written proceeding were in law strictly necessary. In this case the defendant has stated in his evidence that before directing the search he had received the information verbally from Mr. Barniville, the Sub-divisional Magistrate, as well as from Mr. Luffman, the District Superintendent of Police, that the two offences had been committed on the preceding day, and in these circumstances it seems difficult to agree with the learned Judge that the defendant had no power to direct or make the search under the provisions of section 105 read with sections 94 and 96 of the Criminal Procedure Code, because no proceeding was pending before him. The verbal direction to search was in fact in itself a proceeding taken in taking cognizance of the offences. I regret, therefore, that I am unable to agree with the learned Judge that for the reasons given by him the defendant was not authorised to make or direct the search in the premises of the plaintiff. Nothing in this case seems to turn on the meaning of the term "competent" in the provisions of section 105. It simply means that the Magistrate has, under the powers with which he is vested by the Local Government, and in the circumstances stated in the preceding sections 94 and 96, power or authority as such Magistrate to issue the search-warrant.

The next question raised is the alternative whether under the provisions of section 165 of the Code the defendant is protected from the present action. This question has not been considered by the learned Judge. He has simply held that it does not arise.

The learned Counsel for the appellant has relied on the provisions of sections 156, 157, and 165 of the Code of Criminal

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Procedure as showing that Mr. Luffman as District Superintendent of Police had full power to hold an investigation into the two offences committed on the 27th April and power under section 165 of the Code to search the premises of the defendant for the arms with which the offences were committed and which he had reason to believe were in the cutchery, because such a proceeding was necessary for the conduct of the investigation. And all the provisions of the Code as to search-warrants, so far as may be applied, apply to searches under this section, (see sub-section 4 of section 165). If Mr. Luffman as a police officer was acting within the law in conducting such a search it is contended that the defendant, who directed the search, and accompanied the police officer, when he went to make it, would be equally protected by the law. It is to be observed that under the provisions of section 4 of Act V of 1861 powers of general control and direction over the police are given to the Magistrate of a District throughout the limits of his local jurisdiction, and whether the defendant in this instance acted under the powers given by that section or under his powers as a Magistrate under the Code of Criminal Procedure, it is urged that he was equally protected.

This argument seems to be unanswerable, if we take it that the defendant was acting under the powers with which he is vested by section 4 of Act V of 1861, if the search was being made by the District Superintendent of Police.

The learned Counsel for the respondent has, however, argued that in an investigation made under Chapter XIV of the Code of Criminal Procedure, the police officer must proceed strictly in accordance with the provisions of the sections in that Chapter. He must under section 157 send a report to the Magistrate empowered to take cognizance of the offence on the police report, and that report must be submitted through his superior officer (section 158), and on completion of the investigation he must submit a report in the form prescribed by section 173, and if in the course of such an investigation he makes a search, he must note that he has done so in red ink on the report under a departmental order of the police department.

The learned Counsel relies on the report submitted by Mr. Luffman in respect of the offences under sections 326 and 307 of the Indian Penal Code alleged to have been committed on Genda Shaikh, (which is printed at page 47 of the Paper Book) as proving that in fact the cutchery of the plaintiff was not searched in the course of an investigation made by Mr. Luffman into that offence. The report bears date the 2nd May 1907 and contains no entry of any search having been made.

It is not clear, however, that the report is the final report in the case, but the point is not very material. It is to be observed that two dates for the first information are given in it, viz., the 27th April 1907, and the 2nd May 1907, and this seems to support the explanation that the information was given verbally on the 27th April, but not recorded till the 2nd May. The omission to record the entry in red ink to the effect that a search had been made in the course of that investigation, if due to inadvertence, would not itself be sufficient to establish that no search was made, if in fact it was made.

It seems open to considerable doubt whether it would be safe to construe the provisions of the law so strictly in the present case, as the learned Counsel desires, as to deprive the defendant or the police officers acting under his orders of the protection of the law.

If in fact the police officer Mr. Luffman went to the cutchery of the plaintiff under the directions of the defendant to investigate the offence committed against Genda and the search was made in the course of that investigation, it seems only reasonable to hold that they were acting *bonâ fide* under the provisions of the law and therefore the act did not amount to an actionable trespass.

To prove that they did so act there is the evidence of the defendant himself and his written statement. There is the further fact that the defendant went to Jamalpur that day in consequence of the receipt of the telegram from Mr. Luffman with regard to the events of the 27th April. There is nothing

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on the record to indicate that he went in order to make a general search for arms. It is clear that the Mahomedans generally were at the time in a very excited and infuriated state and it was urgently necessary to keep them under control. A search made to ascertain who were the persons guilty of the offences committed on the 27th April would certainly be a movement in that direction.

To support the contrary conclusion the learned Counsel for the plaintiff relies on paras. 6, 8 and 9 of the defendant's written statement and on the absence of any entry relating to any search in the police report of the case instituted by Genda. Paragraph 13 of the same written statement, however, indicates clearly enough that the defendant pleaded from the first that he was acting under the Code of Criminal Procedure and that he relied on section 165 of the Criminal Procedure Code against others to support his plea. If in the press of work and under the stress of circumstances resulting at the time from the disturbed state of the district and the special steps necessary to keep the peace at Jamalpur, the police officer failed by inadvertence to make the entry as to the search required by the rules in the report, the omission can hardly be regarded as of serious importance.

There seems to be no sufficient grounds for disbelieving the truth of the story as told by the defendant in his evidence, and the balance of probability both from the defendant's conduct at the time and from his defence seems to be in favour of the view that he all along thought he was acting under the Code of Criminal Procedure and not under the Arms Act. In fact it would rather appear that he relied on the provisions of the Arms Act as an after-thought.

In these circumstances his act in directing the search does not appear to amount to a trespass in Civil Law, whether it was done under his orders as a Magistrate, or under his directions by the police in the course of the investigation into the offence committed against Genda.

We have next to consider whether the search, if it was made under the provisions of the Arms Act, amounted to a civil

trespass on the part of the defendant, because he failed to comply with the provisions of section 25 of the Act and to record his reasons for making it before he directed it to be made. To prove that the defendant had good reasons for making the search there is his own evidence, which appears to have been accepted as sufficient by the learned Judge, who tried the case. The Judge has found that the defendant acted *bonâ fide* and that he was not actuated by malice or improper motives against any particular individuals or section of the community. He holds, however, that the omission of the defendant to comply with the provisions of the law rendered his act under the Common Law of England a trespass, for which he was liable in damages at Civil Law, though otherwise it might have been right and proper. On behalf of the defendant reliance is placed on the circumstances that the conditions under which he acted were exceptional and that he was obliged under the stress of circumstances and the emergency to take prompt action. On this point the defendant in his evidence says when asked why he omitted to record his reasons for the search under the Arms Act: "There was a great deal to be done, I had not time to look everything up. I could not spare the force of men to watch the cutcheries and have the search later on. I thought of the Arms Act, but I had not it with me and it would take sometime to get a copy. At the time I was not aware of the provisions of the Arms Act. I thought I had power (to direct a search), if I had reasonable grounds. I did not realise I had to record that." Further on he says that in good faith he believed he had jurisdiction in the matter.

For the plaintiff, it has been urged that as the greater number of the Hindus had fled out of panic and the cutchery was deserted there was no necessity for haste, and the learned Judge has expressed the opinion that in searching the cutcherry of the plaintiff the defendant should have proceeded with great circumspection as the fact that he had previously searched the temple and the cutcheries of three other zemindars and had found no arms, should have led him to doubt whether

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the information given to him by the police was correct. But must not the searches made of the temple and the cutcheries be rather regarded as acts forming part of one transaction? It is not as though the cutcheries and the temple were in different places at some distance from one another. The map filed in the record shews that they are all close together and the information appears to have been to the effect that there was a combination amongst the servants of the different landlords to collect the arms for unlawful purposes and that the arms could not be left in their possession without danger to the public peace. In such circumstances it seems hardly reasonable to expect that the defendant should have proceeded with greater circumspection in searching one cutchery than in searching the other buildings.

The real question, however, appears to be, whether the directions in section 25 of the Arms Act that a Magistrate, before making a search, should record his reasons, are mandatory or directory, and in determining this question we may well be guided by the following remarks of Lord Campbell in *The Liverpool Borough Bank v. Turner* (1). "No universal rule can be laid down for the construction of Statutes as to whether mandatory enactments shall be considered as directory only or obligatory, with an implied nullification for disobedience. It is the duty of the Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the Statute to be considered." Now the object of the provisions of the Arms Act, and especially of section 25 of that Act, is clearly to preserve the public peace. Can it be held that the directions in section 25 were in their nature so mandatory that the failure to comply with them would have the effect of nullifying the proceedings? Maxwell in his work on the Interpretation of Statutes, page 556, says—"When a public duty is imposed and the Statute requires that it shall be performed in a certain manner or within a certain time or under other specified conditions, such condition may well be

regarded as intended to be directory only when injustice or inconvenience to others who have no control over those exercising the duty would result, if such requirements were essential and imperative." There can be no reasonable doubt that in laying down the conditions in section 25 of the Arms Act the object of the Legislature was to insure that in each instance a Magistrate should not enter on a search without due care and good and sufficient reasons. At the same time, when, as in the present case, it has been found that the Magistrate acted *bonâ fide* and for good and sufficient reasons, can the failure on his part to record his reasons, which was due to exceptional conditions, stress of circumstances and the emergent necessity for prompt action, be held so to nullify his act as to convert what was right and justifiable for the preservation of the public peace into an actionable wrong? To hold that it would have that effect appears hardly to be consistent with the rules referred to above or with the principles of justice and good conscience. It is no doubt most necessary to prevent public officers from exercising their powers in a harsh, careless or arbitrary manner. At the same time it appears to be hardly just or reasonable to hold that, when an officer has acted *bonâ fide* in what he believed to be the discharge of his duty, and when it has been found that he had good and sufficient reason for his action, he should be liable under the Civil Law for damages for a trespass, because through inadvertence he failed strictly to observe, a formality, which in the circumstances of the case was not of serious importance, and which may be taken to constitute a technical rather than a substantial defect in his proceedings.

This seems to have been the fact in the present case and it seems difficult to say that in consequence the act of the defendant amounted to a trespass.

There remains lastly for determination the question whether the defendant can in this case claim to be protected by the provisions of Act XVIII of 1850, and in dealing with this question it has to be determined whether his act was a judicial act or

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purely an executive act. The learned Judge has held that the act was an executive act. The distinction between a judicial and an executive act in India is not very clearly drawn as many acts, which are purely administrative, are generally described as executive. The main distinction between the two appears to be that judicial acts are those acts done or orders passed in the exercise of the judicial discretion or power with which an officer is vested under the law, while executive acts are of a ministerial character either carrying judicial orders into effect or discharging duties not of a judicial nature. In the case of *Hope v. Evered* (1) to which we have been referred, it has been clearly laid down that the issue of a search-warrant is a judicial act and in the case of *Mahomed Jackariah & Co. v. Ahmed Mahomed* (2) and in the case of *In re Lakhmidas Naranji* (3) a similar view has been taken by the High Courts in India.

The question is whether the order directing a search under the Arms Act or the proceedings in execution of that order differ in essence so materially from searches made otherwise under the law as to constitute the order passed under the Arms Act an executive rather than a judicial act. The whole scope and object of the Arms Act appears to be to impose restriction on the manufacture, sale, import, export and transport and the possession of arms and ammunition, with a view to preserve the public peace and in directing a search under section 25 of the Act the Magistrate has to proceed on information laid to him disclosing that the person is in possession of arms, etc., for any unlawful purpose or that he cannot be left in possession of such arms without danger to the public peace. If he considers that such information is such as to afford sufficient reasons for a search, he is empowered to order one to be made. It can hardly be said that in arriving at the conclusion that the possession was for any unlawful purpose, or that possession of the arms could not be retained without danger to the public peace, the Magistrate is not exercising a judicial discretion, that is to

(1) (1886) L. R. 17 Q. B. D. 338. (2) (1887) I. L. R. 15 Calc. 109, 141.

(3) (1903) 5 Bom. L. R. 980, 982.

say, arriving at a conclusion on the evidence. Indeed, if the act is not a judicial act, it seems difficult to understand what the object of the Legislature was in requiring that the Magistrate should record his reasons. It seems difficult to suppose that the Legislature intended to empower a Magistrate to deprive a person of his property even temporarily by an executive act. It seems to me, therefore, very difficult to hold that the order directing the search was an executive act on the part of the defendant.

If that be the case, then the provisions of Act XVIII of 1850 appear to be sufficiently wide not merely to protect the defendant, but also those acting under him. The section runs: "No Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided that he at the time in good faith believed himself to have jurisdiction to do or to order the act complained of, and no officer of any Court or other person, bound to execute the lawful warrants or order of any such Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially, shall be liable to be sued in any Court for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same."

The learned Judge, who tried the case, has expressed the opinion that the search was "one of the important executive acts, which as District Magistrate the defendant had to perform," but he has not stated his reasons for arriving at that conclusion. I regret to say that I am unable to agree that the order directing the search, based on information received, which was held to afford good reasons for it, and made for the preservation of the public peace, was in fact an executive act. It appears to me, therefore, that the defendant and the police officers acting under him are protected from suit by Act XVIII of 1850.

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The learned Judge in dealing with the question of damages says that the law casts on the defendant as being in supreme control of the search party the obligation of seeing that the search was conducted in a proper and reasonable manner and the learned Judge goes on to say that he entertained no doubt that the search was conducted with unnecessary damage to the property of the plaintiff, and that the defendant failed to exercise proper supervision and control over the people under him conducting the search.

On this point the defendant in his evidence says that he did not see or sanction the destruction of any property more than was reasonably necessary for the purpose of opening the boxes. He says that only one complaint was made to him that the police were doing unnecessary damage and that was when the cutchery and house of the Naib of the Ram Gopalpur cutchery was being searched and that "he took steps to see to it." He adds "I told Mr. Luffman to tell the police to put back the things left lying about, and it is not a fact that the complaint was repeated to me, while I was searching at the plaintiff's premises." He denied that armed Mahomedans accompanied him during the search or took part in breaking open the boxes. It is true that in a latter portion of his evidence the passage occurs "I think daos were used by the Mahomedans, but I am not absolutely certain," but as just before that he had said that the Mahomedans took no part in the search, it seems not impossible that there may have been some confusion on this point in the record of his statement. The context seems to support that conclusion. He says that before breaking open the door of the cutchery and the boxes, he tried to obtain the keys, but none were produced.

In support of his conclusion on this point the learned Judge relies mainly on the evidence of Mr. Horniman. Now, without in any way wishing to question the veracity of that witness, what in fact does his evidence prove? Mr. Horniman did not arrive at the cutchery till the morning of the 1st May, the search having taken place on the afternoon of the 28th

April. To fill up the interval there is the evidence of Safatulla Jemadar. And to prove the character of the search proceedings themselves there is the evidence of Jogesh Chander Dutt, pleader, Issur Chander Guha, mukhtear, and Kali Kumar Mitter, medical practitioner. The evidence of these three last mentioned gentlemen is certainly not beyond suspicion of bias and Safatulla in a post-card, which is proved to have been sent after the occurrence, gave an obviously exaggerated account of what had happened.

But if the evidence of all these be taken into account, what in fact does it amount to? The door of the cutchery house was fastened by a chain and padlock. The padlock was forcibly broken open. The boxes in the cutchery appear to have been fastened, some with chains and padlocks and others with locks, and to open them the padlocks were forced by bamboos and other boxes forced open with daos, that is to say, hatchets. Mr. Horniman expressed the opinion that lock-smiths might have been called in. The defendant on this point says that he did not think of sending for lock-smiths.

The point has been taken for the plaintiff respondent that defendant ought to have examined Mr. Luffman or the Sub-Registrar to prove what was done at the time of the search. To this the learned Counsel for the appellant has replied that those gentlemen and others were cited and were present as witnesses. It was not deemed necessary to examine them as it was thought that if the Court would not believe Mr. Clarke it would not be likely to believe officers subordinate to him, who were in fact alleged to have been equally blameworthy for the method of the search and one of whom was a defendant in a similar action on the same facts. I must say that I fail to see how the evidence of these witnesses would have materially improved the position of the defendant, as clearly each of them would have been open to the imputation of bias.

It has been suggested that the papers contained in the boxes ought to have been replaced, when no arms were discovered. I doubt, however, whether in similar searches, when conducted

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by other authorities under similar circumstances, such consideration is shewn however desirable it may be. No attempt was made to support the case for the plaintiff as set out in the plaint that papers of value were lost and destroyed. The search does not appear to have been conducted in an unusual manner and I am unable to agree with the learned Judge that it was conducted with unnecessary damage to the property of the plaintiff.

For the above reasons, I am unable to agree with the learned Judge in holding that the defendant was liable to pay the damages, which has been awarded against him, and I would decree the appeal and dismiss the suit with costs.

Appeal dismissed.

Attorney for the appellant : *F. H. Eggar.*

Attorney for the respondent : *H. N. Datta.*

J. G.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Harington and Mr. Justice Brett.

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Hindu Law—Impartible Raj—Separation in estate, whether possible—Spes successionis—Cause of action—Leave to amend.

In the case of an impartible Raj, during the life of the holder, the interest of a member of his family is only a *spes successionis*, which is not a subject for partition: also, there can be no separation in estate, as there is nothing upon which such separation can operate.

An application for leave to amend the plaint, so as to disclose a cause of action, refused as being made at too late a stage of the case.

APPEAL by the plaintiff, Laliteswar Singh, from the judgment of Fletcher J.

This suit was brought by the plaintiff, Laliteswar Singh for a declaration of his title to the Durbhanga Raj and for the recovery of possession of the property of the Raj from the defendant, who was then in possession. The two widows of the late Maharajah were made party-defendants to the suit.

The Durbhanga Raj is an ancient impartible Raj, and its properties appertain to the Raj and devolve on the successor to the Raj.

In 1850, Maharajah Rudra Singh of Durbhanga died leaving four sons Moheshwar Singh, the eldest, Ganeshwar, the second and two other sons. His successor Moheshwar Singh died in 1860 leaving Lakshmishwar Singh, his eldest son, and the respondent Rameshwar Singh, and was succeeded to the Raj by Lakshmishwar Singh. Ganeshwar Singh died in 1903, leaving two grandsons by his predeceased eldest son, two grandsons by his predeceased second son, the appellant

* Appeal from Original Civil No. 15 of 1908.

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Laliteshwar Singh, his third son, and a fourth son. Lakshmi-shwar Singh died on the 17th December 1898 without leaving issue, and on his death his brother Rameshwar Singh entered upon and took possession of the Raj. On the 27th March 1907 this suit was filed.

It was alleged by the plaintiff that on the 28th August 1880 the defendant Rameshwar Singh had renounced and relinquished all his claims to the properties of the Raj, at the time held by his father Moheshwar Singh, that the defendant had long been separate in food and worship from his brother Lakshmishwar Singh, and that on the 28th August 1880 owing to disputes and differences between them they became separate in estate and were never thereafter re-united in food, worship or estate, whereas, he, the plaintiff, continued to be joint in estate with Lakshmishwar Singh until his death. The plaintiff further alleged that the succession to the Durbhanga Raj was governed by the *ordinary* rule of primogeniture subject to the *kulachar* or family custom whereby the reigning Raja had the power of abdicating and assigning the Raj in favour of his nearest immediate male heir, and that no such abdication or assignment had been made by the late Maharajah Lakshmishwar Singh. The plaintiff accordingly claimed, that on the death of the late Maharajah, he became entitled to succeed to the Raj and its property by survivorship. He added that he was ignorant of his rights until the recent claim by the defendant Maharanis to the property of the Raj.

The defendant Rameshwar Singh denied that he had in any way renounced or relinquished his right of succession to the properties of the Raj, or that he had at any time become separate with the late Maharajah in estate and stated that a certain deed of the 20th August 1880 only purported to give him certain properties as a maintenance or *babuana* grant. He alleged that the succession to the Durbhanga Raj and its properties was regulated by the *kulachar* or family custom according to which the succession devolved upon the next immediate male heir of the last holder, to the exclusion of females according to the rule of *lineal* and not *ordinary* primogeniture. The

defendant submitted that he had rightfully succeeded to the Raj on the death of Lakshmishwar Singh by virtue of the *kulachar* or family custom, by virtue of an adoption alleged to have occurred in November 1896, and lastly as the united brother of the late Maharajah. The defendant further alleged that in 1904, at the instigation of the plaintiff, the widows of Lakshmishwar Singh instituted an action contesting the defendant's title and claiming the Raj, and that on this action being compromised in March 1906 by a consent decree confirming the defendant's title, the present suit was instituted for the purpose of harassment and extortion. A further plea of limitation was raised in defence.

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The suit was set down for settlement of issues. In his opening Counsel for the plaintiff admitted that the plaint required amendment. Fletcher J., however, on the 30th March 1908, dismissed the suit on the ground that the plaint could not be so amended as to disclose a valid cause of action. The judgment of his Lordship was as follows:—

FLETCHER J. This suit is set down for settlement of issues.

On Mr. Hill opening his case, it was admitted by him that the plaint requires some amendment. The question is whether the plaint can be so amended as to disclose a reasonable cause of action, which ought to be tried by this Court.

The suit is brought to recover possession of the Durbhanga Raj estate. The present Maharaja is the brother of the deceased Maharaja. The plaintiff alleges in his plaint that the present Maharaja ceased to be joint in food, estate and worship with the deceased Maharaja, that the plaintiff's father and the plaintiff remained joint in food, estate and worship with the deceased Maharaja and that upon the death of the deceased Maharaja in 1898 the plaintiff in accordance with the family custom succeeded to the Raj.

That is an obvious error because the plaintiff's father did not die until the year 1903 and if any one succeeded to the Raj, it must be according to the plaintiff's own account his own father. That, as Mr. Hill says, is capable of being amended.

Now, it is admitted by both sides that the Raj is an impartible estate. In fact this is the substance of the plaintiff's claim, *viz.*, that he succeeded to the Raj as an impartible estate. It is well established by authority that an impartible estate is capable of alienation by the holder either *inter vivos* or by will. The only case in which this estate is to be considered joint is for purposes of succession and maintenance of the younger members of the family. The Raj is therefore to be considered joint estate only in the case for determining

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who is to be the successor to the Raj and being an impartible estate the defendant could not have separated *quoad* the Raj from the late Maharaja.

The plaintiff also alleges that by the *kulachar* or family custom the succession to the Raj is governed by the rules of lineal primogeniture and not of ordinary primogeniture. It is however admitted that whether the succession to the Raj is according to ordinary or lineal primogeniture, the right of the defendant is prior to that of the plaintiff unless it can be shown that the defendant separated in estate from the late Maharaja.

As I have already said, it is the plaintiff's own case that the Raj is an impartible estate and so incapable of partition, it follows, in my opinion, that there could be no separation in estate between the late Maharaja and the defendant *quoad* the Raj.

In my opinion, the plaint in this case cannot be amended so as to disclose a valid cause of action. The whole basis of the suit rests upon a separation in estate between the late Maharaja and the defendant with respect to this impartible estate. The suit is therefore, in my opinion, frivolous and vexatious and I order that the same be dismissed with costs including all costs reserved.

From this judgment, the plaintiff appealed.

Mr. Pugh, for the appellant. This suit should not have been dismissed on the pleadings. The proposition, that in the case of an impartible Raj, the question of the alleged separation was immaterial, is, it is submitted, erroneous. The question of separation from the joint family is a material question of fact which must be decided on the evidence. The test of the right to succeed to an impartible Raj, is whether the claimant was joint with the late holder, or separate from him. The Privy Council has in numerous cases laid down this test as deciding the right to succeed: see *Katama Natchiar v. The Rajah of Shivagunga* (1), *Stree Rajah Yanumula Venkayamah v. Stree Rajah Yanumula Boochia Vankondora* (2), *Chowdhry Chintamun Singh v. Mussamut Nowlukho Konwari* (3), *Periasmi v. Periasmi* (4), and *Doorga Persad Singh v. Doorga Konwari* (5). *Ram Nundon Singh v. Janki Koer* (6) was tried on the question of fact, whether there had been separation or not. In the present case, the appellant's claim as a joint cousin is prior to that of the respondent, a separated brother. It was

(1) (1863) 9 Moo. I. A. 539.

(2) (1870) 13 Moo. I. A. 333.

(3) (1875) L. R. 2 I. A. 263.

(4) (1878) L. R. 5 I. A. 61.

(5) (1878) I. L. R. 4 Calc. 190.

(6) (1902) L. R. 29 I. A. 173;

I. L. R. 29 Calc. 828.

admitted in the Court of first instance that some amendment of the plaint was necessary. The amendment is of a formal nature to shew that the plaintiff's cause of action arose in the lifetime of his father, as he must be taken to have abdicated in favour of his son, or at any rate, if not on the 17th December 1898, on the father's death in 1903, and to make it more clear that the plaintiff claimed priority over the sons of his predeceased elder brothers, as the *kulachar* or family custom was of succession by the rule of ordinary and not lineal primogeniture.

Mr. Garth (Mr. Dunne, Mr. Chakravarti and Mr. B. C. Mitter with him), for the respondent. It has been held in the later decisions of the Privy Council that an impartible estate is capable of alienation by the holder either *inter vivos* or by will : *Thakur Shankar Baksh v. Dya Shankar* (1), *Sri Rajah Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur v. Court of Wards and Venkata Kumari Mahipati Surya Rao* (2). It follows that the owner of an impartible Raj is the absolute owner, and the other members of the joint family during the life of the holder have no present interest in the Raj, and having none, there is nothing to relinquish, and in Law there can be no separation, *quoad* the Raj. A member may cease to be joint in food and worship, but not *quoad* the Raj. All that exists during the life of the holder is a *spes successionis*. And this does not amount even to a reversionary right. *Nund Kishore Lal v. Kanee Ram Tewary* (3) was also referred to.

Mr. Pugh, in reply. The decisions in the Privy Council cases cited against me cannot overrule the decisions in the Privy Council cases cited by me. They must stand together and be reconciled. During the life of the holder of an impartible estate, the interest of the other members may be a *spes successionis*, which would be no present interest. But this is not inconsistent with the theory, that the test of the right of succession on the death of the holder is whether the claimant was joint with the holder, or not.

Cur. adv. vult.

(1) (1887) L. R. 15 I. A. 43.

(2) (1899) L. R. 26 I. A. 84.

(3) (1902) I. L. R. 29 Calc. 355.

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MACLEAN C.J. This is a suit to recover possession of the Durbhanga Raj estate, one of great value. The present Maharajah is a brother of the late Maharajah; and the plaintiff's case is that the present Maharajah and the late Maharajah had long been separate in food and worship, and owing to disputes and differences between them, they on or about the 28th of August 1880 became separate in estate and were never thereafter re-united in food, worship or estate. He further alleges that on or about the last-mentioned date the defendant Maharajah for valuable consideration moving from the late Maharajah renounced and relinquished by deed all his claims to any of the properties moveable and immoveable held by Maharajah Moheshwar Singh or which might have been subsequently acquired and added thereto: that the late Maharajah died suddenly on the 17th December 1898 intestate and without having abdicated or assigned the Raj, leaving no issue, natural or adopted, but leaving the plaintiff and the Maharajah defendant his brother, from whom he had been separated as aforesaid, and leaving behind him amongst other things, the property described in the schedule to the plaint, whereof he was the owner, being entitled thereto as an impartible Raj, subject to the *kulachar* custom or usage mentioned in the 10th paragraph of the plaint. The case of the defendant put shortly is that the Durbhanga Raj is an ancient impartible estate held and enjoyed by the defendant's family for several centuries, and the devolution thereof, and the succession to the said Raj are regulated by the *kulachar* or family custom attaching to the said Raj, according to which the succession devolves upon, and passes, to the next immediate male heir of the last holder, to the exclusion of females, according to the rule of lineal primogeniture: and the defendant denies that the rule of ordinary primogeniture governs such succession as stated in the 10th paragraph of the plaint. He also says that it is wholly untrue that the defendant and the late Maharajah became, on the 28th day of August 1880, or at any time, separate in estate, the fact being that, on the 20th of August 1880, an arrangement was come to between the late

Maharajah and the defendant, by which, according to the usual custom and practice of the family, certain properties known as Pargana Bachur were given by the late Maharajah to the defendant to have and to hold the same as a maintenance or *babuana* grant with the same incidents as are usually attached to *babuana* grants made to junior members of the said Raj family.

In his argument before us, Counsel for the plaintiff relied upon the deed effecting this arrangement, and which is appended to the written statement, though not set forth in the plaint. The Raj admittedly is an impartible estate, and being an impartible estate the defendant could not have separated so far as the Raj is concerned, from the late Maharajah. All interest, the defendant could then claim in the Raj, was a *spes successionis* which was clearly not a subject for partition. In the suit brought by the defendant against the late Maharajah the question raised was whether the Raj was partible or not, and the compromise was based on the condition that the defendant withdrew that plea and not that the defendant accepted the terms offered as compensation for the rights which he had in the Raj, which in fact was then only a *spes successionis*. There was nothing to separate.

With respect to the case that succession to the property of the Raj is governed by the rule of ordinary primogeniture, and not by the rule of lineal primogeniture, it was conceded. that, whether the succession to the Raj was according to the rule of ordinary primogeniture or that of lineal primogeniture, the plaintiff cannot succeed unless he can show that the defendant separated in estate from his brother, the late Maharajah. But if it was an impartible estate there was nothing upon which separation of estate could operate.

I now pass to the question of amendment. The suit was set down for settlement of issues. Counsel for the plaintiff admitted that without amendment, the plaint disclosed no cause of action. It is not clear what the proposed amendments were, nor is it clear that leave to amend was ever asked for: if it were admitted that the plaint as it stood disclosed no cause of action and an amendment was asked for, it would have been

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preferable to ascertain what the amendment asked for was, and if the Court thought that the amendment was permissible to have dealt with the case on the footing of that amendment. But apparently nothing was said as to what the proposed amendment was to be. When the case came before us, Counsel asked for leave to amend, and at the bar the amendment he asked for was of a very formal nature, merely to show how the defendant as a third son of Maharajah Kumar Ganeshwar Singh, who did not die until the year 1903, had become entitled to the Raj, notwithstanding the existence of other members of the family, the grandsons, who survived the Maharajah Kumar Ganeshwar Singh. We asked that these amendments should be reduced into writing ; this has been done and they assume a different and wider aspect. But the amendments, even if we allowed them at this late stage of the case, only show that the claim of the plaintiff is dependent upon the so-called separation between the present Maharajah and his brother the late Maharajah, and, as has been shown, this Raj being impartible, there could be no such separation in estate. Apart from this, however, in the exercise of the judicial discretion which is vested in us, we think it is too late, at this stage of the case, to allow the amendment, which was not submitted or asked for to the Court of first instance. The appeal, therefore, must be dismissed. We think the suit is a vexatious one, and we dismiss the appeal with costs.

HARINGTON AND BRETT JJ. concurred.

Appeal dismissed.

Attorneys for the appellant : *Pugh & Co.*

Attorneys for the respondent : *B. N. Basu & Co.*

J. C.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice and Mr. Justice Brett.

*In re MAUD ANDERSON.**

1909
Feb. 15.

Insolvency—Indian Insolvent Act (11 and 12 Vict. c. 21)—Jurisdiction—Summary proceeding—Order for Ejectment of insolvent Tenant, on application of Landlord, whether valid.

On an application by the insolvent's landlord, who was an admitted creditor in respect of arrears of rent, for an order that the insolvent should make over possession of the premises to the Official Assignee:—

Held, that there was nothing in the Insolvent Act, which enabled the Court, sitting in Insolvency, on a summary proceeding, to make at the instance of the landlord, what was virtually an order for ejectment against the tenant.

APPEAL by the insolvent, Maud Anderson.

THIS was an appeal by the insolvent, Maud Anderson, from an order of Sharfuddin J., dated the 21st September 1908, and a subsequent order of Fletcher J., dated the 18th November 1908.

It appears that Miss Maud Anderson, a boarding house-keeper, was for some time prior to and at the time of her insolvency a monthly tenant of the premises No. 77, Dhurrumtollah Street belonging to one Baloram Das at a rent of Rs. 300. On the 4th August 1908, she filed her petition in Insolvency, and on the same day, a vesting order was made, vesting all her property in the Official Assignee. Her schedule showed her total liability at Rs. 2,952, out of which the sum of Rs. 2,479 was set out as due to the landlord for arrears of rent.

On the 1st September 1908, Baloram Das called upon the insolvent to make over possession of the premises immediately. On her failure to do so, on the 7th September 1908, he made an application, before the Commissioner in Insolvency, alleging that more than Rs. 3,000 was due for arrears of rent, out of which he had obtained decrees for rent amounting to Rs. 2,843, and praying for "an order that the

* Appeal from Original Civil, No. 63 of 1908.

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insolvent may be ordered to show cause why she should not forthwith deliver up possession of the premises No. 77, Dhurrumtollah Street to the Official Assignee or to the petitioner, and in default why she should not be committed for contempt."

The matter came on for hearing before Sharfuddin J. on the 21st September 1908. The insolvent submitted that no order of ejectment could be passed against her on an application in Insolvency; the Court, however, ordered the insolvent to make over possession within a week to the Official Assignee. His Lordship observed as follows :—

SHARFUDDIN J. This is a rule calling upon the insolvent, Maud Anderson, to shew cause why she should not deliver possession of No. 77, Dhurrumtollah Street in Calcutta to the Official Assignee or to the applicant, and in default why she should not be committed for contempt. It appears that the insolvent filed her insolvency petition on the 4th August 1908, and with that also she filed a schedule of property in possession, and in that schedule I find under the heading interest in land, houses, rents and other real estate no mention of any interest in the house in question and it is described in the schedule as *nil* and the only two properties described as in the possession of the insolvent are two dog carts and one office-jaun. The contention on behalf of the proprietor of the house No. 77, Dhurrumtollah Street, is to the effect that the insolvent after being declared insolvent should have delivered possession of the said premises to the Official Assignee or to him. So far as the delivery to himself is concerned, that part of the case has been given up and the applicant confines his case to the first part, namely, that the insolvent make over possession to the Official Assignee which has not yet been done. Under section 7 of the Indian Insolvency Act, it is clear that all the interest of the insolvent on the making of the vesting order vested in the Official Assignee, and under section 21 of the said Act the Official Assignee has to take possession of all such interest of the insolvent and then to exercise his discretion as to whether he would keep the property in his possession or not. Learned Counsel appearing on behalf of the insolvent to shew cause concedes that under section 21 all property should be taken possession of by the Official Assignee who is to elect whether he will keep possession of the property or not. Under these circumstances, I am of opinion that the insolvent should at once deliver possession of the premises to the Official Assignee. As to her being committed for contempt, that I do not think I should do for although the insolvent has not disclosed any interest in the premises No. 77, Dhurrumtollah Street, she has described herself as a boarding house-keeper carrying on business at No. 77, Dhurrumtollah Street. I do not think she has wilfully concealed her interest in the property in question. In the above circumstances, I make the rule absolute so far as it concerns the delivery of possession of the premises to the

Official Assignee. After the Official Assignee has taken possession it will be for him to decide what he will do with the property. He may allow the insolvent to carry on business in the premises if he chooses, or he may ask the insolvent to vacate. I direct the insolvent to make over possession within a week.

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Thereupon, the insolvent requested the Official Assignee to allow her to reside in the premises, but the Official Assignee refused to do so, and appointed the 28th September 1908 for the insolvent to make over vacant possession of the premises to him, when he proposed to make over possession to the landlord. The insolvent failed to do so. On the 13th November 1908, Baloram Das obtained a rule from the Insolvency Court calling upon the insolvent, "to shew cause why she should not carry out the order of the 21st September 1908, and why in default she should not be attached for contempt." On the 18th November 1908, the rule *nisi* of the 13th November 1908 was made absolute by Fletcher J. and it was ordered that a writ of attachment do issue against the person of the insolvent on the 28th November, 1908, for disobedience of the order of the 21st September 1908.

The insolvent appealed under section 73 of the Insolvent Act from the order of Sharfuddin J., dated the 21st September 1908, and the contempt order of Fletcher J., dated the 18th November 1908.

Mr. Avetoom, for the appellant. The Commissioner in Insolvency had no jurisdiction to make the order of the 21st September, 1908. It amounted to an order for ejectment at the instance of the landlord against the tenant. There is no provision in the Insolvent Act allowing of such an order being made. An order of this nature could only be made on the application of the Official Assignee.

The Advocate-General (Mr. Sinha) (Mr. C. C. Ghose with him), referred to *In re Finley, Ex parte Clothworkers' Company* (1) with reference to the practice prevailing in England. The landlord's position was one of hardship: the insolvent tenant neither could pay the rent, nor would she quit the premises. By

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section 22 of the Insolvent Act, I was debarred from distraining. The landlord's only remedy was to ask the Court to order his premises to be made over to the Official Assignee, who would then elect to retain the property and be open to an action brought by the landlord, or make over the property to the landlord. Under section 26 of the Insolvent Act, the Court had power to make a similar order against a stranger : surely, the Court had jurisdiction to make the order against the insolvent himself. To relegate the landlord to a suit for ejectment, would subject him to loss of rent for a considerable interval.

MACLEAN C.J. One Maud Anderson became insolvent on the 4th of August 1908. It appears that she was a monthly tenant of certain premises known as 77, Dhurrumtollah Street, at a rent of Rs. 300. On the 7th of September 1908, an application was made by her landlord the practical object of which was that the insolvent should be ordered to shew cause why she should not forthwith deliver up possession of those premises either to the landlord or to the Official Assignee. That matter came on for hearing, and notwithstanding the objection of Maud Anderson, the insolvent, the Court ordered the insolvent to make over possession within a week to the Official Assignee. She did not do that, and the result was that a contempt order was passed on the 18th of November 1908. She now appeals : and she says that the Court sitting in Insolvency had no jurisdiction to make the first order. I think her contention must prevail. I can see nothing in the Insolvency Act which enables the Court to make at the instance of a landlord, what is virtually an order for ejectment against his tenant. It is said that her interest in this house vested in the Official Assignee. That would be true if she had any interest, but the landlord proceeds on the footing that the lease had determined, that Maud Anderson was a trespasser and that he was entitled to immediate possession. In this view, there was nothing to vest in the Official Assignee. If the Official Assignee thought he was entitled to and wanted possession, it was for him to have applied to the Court. But there are no provisions in the Insolvency

Act which enable the Court sitting in Insolvency on a summary proceeding like the present to make virtually an ejectment decree, at the instance of a landlord, against his tenant. The appeal therefore succeeds and must be allowed with costs both here and in the Court of first instance. The order for committal must also be discharged. I regret the result, because I think the appellant has been too smart for the other side.

BRETT J. I agree.

Appeal allowed.

Attorney for the appellant : *N. B. Sarkar*

Attorney for the respondent : *P. L. De.*

J. C.

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APPELLATE CIVIL.

Before Mr. Justice Coxe and Mr. Justice Doss.

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1908
Aug. 7.

Attorney and Client—Settled Account, re-opening of—Accounts settled on basis of Untaxed Bills—Fiduciary Relationship—Onus of Proof in Transactions between Attorney and Client—Independent Advice—Assignment of Promissory Notes, validity of—"Final decree," meaning of—Contract Act (IX of 1872), s. 16—Evidence Act (I of 1872), s. 111.

Where the plaintiff, a solicitor, had acted for the predecessor in title of defendants in various matters and had also from time to time advanced money to him and also received various sums on behalf of the plaintiff, and subsequently an account was settled on untaxed bills between the plaintiff and the said predecessor of the defendants, in which an independent solicitor acted for the same, and, as a result, at first a mortgage and then three further charges were executed in favour of the plaintiff, in a suit to recover the money due on these securities :—

Held, first, that the mere existence of fiduciary relationship between attorney and client will not entitle the client to have a settled account, concluded by

* Appeal from Original Decree, No. 229 of 1907, against the decree of Ambikacharan Mukerjee, Offg. Additional Subordinate Judge of Hooghly, dated March 29, 1907.

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mortgage, re-opened unless *sufficient cause* be shown, i.e., a *prima facie* case is made out that the bills are extortionate, or at any rate incorrect.

Lawless v. Mansfield (1) explained. *Lambert v. Still* (2), *Morgan v. Higgins* (3) and *Blagrove v. Routh* (4) followed.

Secondly, that if an attorney advises his client to take independent advice and the client does so, it is not the business of the attorney to see that the new attorney is doing his duty diligently.

Thirdly, that section 16 of the Contract Act taken with section 11 of the Evidence Act does not make it incumbent upon the attorney that, in order to prove his good faith, he must prove that all the accounts on which the settled account is based are correct.

Fourthly, that according to the practice prevailing in the Original Side of the High Court, taxation of bills of solicitors is optional, and bills are often adjusted without such taxation.

Monohur Doss v. Romanauth Law (5) distinguished.

Fifthly, if parties to a promissory note agree that, on the debtor executing a bond in favour of a third person, the creditor would cancel the promissory note, the arrangement would be a perfectly valid contract although a promissory note is a negotiable instrument.

Lastly, that where an order in precise terms orders accounts to be taken, it is a "decree."

Coverji Luddha v. Morarji Punja (6) not followed. *Rahimbhoy Habibbhoy v. Turner* (7) followed.

APPEAL by the plaintiff, Shamaldhone Dutt.

This was a suit to recover money due on an indenture of mortgage, dated the 6th October 1898, and on three indentures of further charge on the same properties, dated respectively the 4th April 1900, 11th May 1901 and the 3rd August 1903.

The plaintiff was the attorney, for a long series of years, of one Radhanath Mukherjee, deceased, whose widows are the defendants Nos. 1 and 2 in this suit and whose mother was the defendant No. 3. The mother died after written statement on her behalf was filed in the present suit.

In pursuance of an order of the High Court, Mr. R. Belchambers, who had been previously appointed Receiver of the immoveable properties allotted by a partition-decree of the High Court to the said Radhanath Mukherjee, together with

(1) (1841) 1 Dr. & War. 557;
58 R. R. 303.

(2) [1894] 1 Ch. 73.

(3) (1859) 1 Gif. 270.

(4) (1856) 8 DeG. M. & G. 620.

(5) (1878) 1 L. R. 3 Calc. 473.

(6) (1885) 1 L. R. 9 Bom. 183.

(7) (1890) 1 L. R. 15 Bom. 155;
L. R. 18 I. A. 6.

Radhanath and his wife, executed in favour of the plaintiff the mortgage deed for Rs. 25,000 on the 6th October 1908 to meet debts and a decree in suit No. 227 of 1877 against the estate. Under another order of the High Court, passed in the same suit No. 227, the Receiver, with the other two, executed the indenture of the first further charge for Rs. 5,000 in favour of the plaintiff on the 4th April 1900. Under a subsequent order of the High Court, they executed on the 11th May 1901 the indenture of the second further charge for Rs. 7,500 in favour of the plaintiff. Later on, under an order of the High Court passed in the same suit No. 227, the Receiver when discharged placed Radhanath and his attorney, the plaintiff, in joint possession of some of the immoveable properties belonging to Radhanath and made over to Radhanath alone all the papers of the main estate and placed him in possession of all other moveables and immoveables. More than a year after this, Radhanath alone executed in favour of the plaintiff the indenture of the third further charge for Rs. 21,000 on the 3rd August 1903. The consideration for the last indenture was stated to be made up of interest on the mortgage and the following two charges, promissory notes executed from time to time by Radhanath in favour of the plaintiff and in favour of another, with interest and costs due to the plaintiff.

Defendant No. 2 really contested the suit, putting the plaintiff to the proof of all the material allegations of fact in the plaint and contending, *inter alia*, that inasmuch as the plaintiff's bills of costs were not taxed, as they ought to have been, under an order of the High Court, the plaintiff should not be allowed to recover the sum before taxation.

The Subordinate Judge upheld the contention of the defendants holding that the bill of costs should have been taxed, and that as it was not done, accounts of the third further charge should be re-opened, the bills taxed and then a commissioner appointed to take accounts and a decree drawn up thereafter. The plaintiff thereupon applied for taxation, but the Taxing Officer declined to tax the bills after this long lapse of time. The plaintiff, therefore, preferred this appeal.

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Babu Harendra Narain Mitra (*Babu Tarhit Mohan Das* with him), for the respondents, raised a preliminary objection that no appeal lay as the decision of the Subordinate Judge was not a final adjudication, and it did not direct "accounts to be taken" in the technical sense of the words. The order was only interlocutory: *Coverji Luddha v. Morarji Punja* (1).

Babu Pravash Chandra Mitra (*Babu Hira Lal Sanyal* with him), for the appellant. The order is a final adjudication. It finally decided the dispute between the parties and set aside the third further charge and declared that it was not binding on the defendants. If a decree be passed on the basis of the taxed bills such a decree would not be a decree on the further charge in the suit, and so far as the validity of the final charge is concerned, the Court below has finally determined the same. I rely on *Rahimbhoy Habibbhoy v. Turner* (2), *Dulhin Golab Koer v. Radha Dulari Koer* (3) and *Jogodishury Debea v. Kailash Chundra Lahiry* (4). Further, the order of the Subordinate Judge was an order "directing accounts to be taken" and is a "decree" within the meaning of section 2 of the Civil Procedure Code.

The accounts of a solicitor cannot be re-opened unless some error or overcharge be proved. Mere general charges of undue influence will not justify a Court to re-open settled accounts, specially when such accounts are settled under independent advice. I rely on *Lambert v. Still* (5), *Lewes v. Morgan* (6), *Hickson v. Ayalward* (7) and *Mohesh Chandra Bosu v. Radha Kishore Bhattacharjee* (8). The circumstances of the case *Monohur Doss v. Romanauth Law* (9) were quite different. In the present case there was independent legal advice, large remissions were allowed, evidence of settlement of accounts

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| (1) (1885) I. L. R. 9 Bom. 183. | (4) (1897) I. L. R. 24 Calc. 725. |
| (2) (1890) I. L. R. 14 Bom. 428 ; | (5) [1894] 1 Ch. 73. |
| (1890) I. L. R. 15 Bom. 155 ; | (6) (1829) 3 Y. & J. 230. |
| L. R. 18 I. A. 6. | (7) 3 Mol. (Ir.) 15. |
| (3) (1892) I. L. R. 19 Calc. 463. | (8) (1907) 12 C. W. N. 28. |
| (9) (1878) I. L. R. 3 Calc. 473. | |

has been clearly established, and there is positive evidence that there was no undue influence.

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Babu Harendra Narain Mitra, for the respondent. As an attorney stands in a fiduciary relation to his clients, settled accounts between them can be re-opened without specific errors being alleged: *Lawless v. Mansfield* (1), *Lewes v. Morgan* (2) and *Hickson v. Aylward* (3) are distinguishable.

A solicitor must always be ready with his accounts. Assuming that the accounts are all fair and proper, still they should be gone into to disarm suspicion. As regards a solicitor's duty to his client about accounting, see *Brojendra Nath Mullick v. Luckhimoni Dassee* (4), *Usmut Koowar v. Tayler* (5) and *In the Matter of Thakur Dassee Dassee* (6). *Monohur Doss v. Romanauth Law* (7) is practically on all fours with the present case.

The promissory notes in favour of Prakash not being assigned by him cannot confer any title to the plaintiff: *Muhamad Khumar Ali v. Ranga Rao* (8), *Muthar Sahib Maraikar v. Kadir Sahib Maraikar* (9) and *Arunachala Reddi v. Subba Reddi* (10).

Babu Pravas Chandra Mitra, in reply, referred to *Morgan v. Higgins* (11) and *Blagrove v. Routh* (12).

Cur. adv. vult.

COXE AND DOSS JJ. This was originally a case of considerable complexity, but for the purposes of this appeal the matters essentially in dispute may be stated at no great length.

The plaintiff, Babu Shamaldhone Dutt, was the attorney of one Radhanath Mukherjee, a gentleman, who apparently devoted much of his life to litigation. The indulgence of this

(1) (1841) 1 Dr. & War. 557;
58 R. R. 303.

(2) (1829) 3 Y. & J. 230.

(3) 3 Mol. (Ir.) 15.

(4) (1902) I. L. R. 29 Calc. 595.

(5) (1865) 2 W. R. 307.

(6) (1906) I. L. R. 33 Calc. 327.

(7) (1878) I. L. R. 3 Calc. 473.

(8) (1901) I. L. R. 24 Mad. 654.

(9) (1905) I. L. R. 28 Mad. 544.

(10) (1907) 17 M. L. J. 393.

(11) (1859) 1 Gif. 270.

(12) (1856) 8 DeG. M. & G. 620; 26 L. J. Ch. 86.

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taste involved him in great expenditure, and the plaintiff advanced him considerable sums towards meeting it. For these advances, Radhanath Mukherjee executed at first a mortgage and then three further charges in favour of the plaintiff, and the plaintiff brings this suit to recover the money due on these securities. We are not concerned in this appeal with the original mortgage and the first two further charges.

The third charge was executed on the 3rd August 1903 for a consideration of Rs. 21,000 which, excluding fractions, was made up as follows :—

	Rs.
Interest on mortgage and previous two charges	6,468
Promissory notes executed by Radhanath for advances made by the plaintiff from time to time	14,870
Interest on the same... ..	1,451
Promissory notes executed by Radhanath in favour of Prakash Ghosh with interest	6,163
Costs due to plaintiff	13,593
Total ...	42,545
Deduct sum received by plaintiff from Radha Nath's estate	14,452
Remitted by plaintiff out of the sum of Rs. 13,593 above	7,093
	21,545
Balance ...	21,000

The Subordinate Judge with respect to the first item of Rs. 6,468 has left the calculation of the proper amount to be settled when accounts are taken. He is apparently satisfied of the liability of Radhanath on the hand notes, but with respect to the sum of Rs. 13,593 he has held on the authority of *Monohur Doss v. Romanaruth Law* (1) that the plaintiff ought to have had his bills taxed, and that as he did not have them taxed

the accounts of the third further charge should be re-opened. Accordingly he directed that the accounts relating to the third further charge should be re-opened, that the plaintiff should get his bills taxed and then refile them in Court; that then a commissioner should be appointed to take accounts and thereafter that a decree should be drawn up under section 89 of the Transfer of Property Act.

The plaintiff then applied for the taxation of his bills. But we are told that after this lapse of time, the Taxing Officer declined to tax his bills without the orders of the Court. As the bills were old bills and related to several cases, the orders of the Court could not have been obtained without several applications, and as this would have cost money, and the result was doubtful, the plaintiff decided to present this appeal. The appellant takes objection to the finding of the Subordinate Judge on various questions of fact, but the main ground of the appeal is that the Court should not have ordered the accounts relating to the third charge to be re-opened.

A preliminary objection is taken that no appeal lies as the order of the Subordinate Judge does not amount to a decree as defined in the Civil Procedure Code. It is urged that all that the Subordinate Judge has done is to order the plaintiff to have his bills taxed and that the stage of directing accounts to be taken has not yet been reached, nor has any right claimed been as yet adjudicated upon, so far as the third charge is concerned. Reliance is placed on the decision in *Coverji Luddha v. Morarji Punja* (1). But if that case can still be regarded as a correct statement of the law after the decision in *Rahimbhoy Habibbhoy v Turner* (2), it does not really help the respondent much. In that case the defendants were held liable to pay half of whatever sum the Government Surveyor might certify to be due for certain work. Further enquiries were made and a final decree was made later. The defendants appealed, and it was argued that the first order was a decree and that an appeal against it was barred by limitation. The Court held that it was not

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(1) (1885) I. L. R. 9 Bom. 183.

(2) (1890) I. L. R. 15 Bom. 155 ;
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an adjudication that decided the suit, and on the point whether it was an order directing accounts to be taken they observed :— “The words ‘directing accounts to be taken’ are precise and technical, and as the order does not fall within that description we must hold that it is not a decree.” The natural inference is that if the order had, in precise terms, ordered accounts to be taken, as is the case here, the Court would have regarded it as a decree. And clearly a Court would be disposed to construe the definition of a decree with extreme strictness far more in such a case, where if the order complained of was regarded as a decree, the appeal was barred by limitation, than in a case like the present, where the sole question is whether the appeal should be made now or a little later when some further orders, more or less of a formal character, have been made. It must be remembered that the plaintiff has endeavoured to carry out the orders of the Court, and that it is only when he has found that they cannot be carried out without expense and risk that he has preferred this appeal.

The matter, however, may be put on a wider ground. The point on which this appeal almost exclusively turns is the question whether the accounts relating to the third charge should be re-opened. The third charge contains a formal covenant to pay Rs. 21,000, and the effect of the learned Subordinate Judge’s decision is that the defendants are held not liable to perform this contract, as it stands, because the plaintiff being in a position of active confidence towards Radhanath Mukherjee has failed to prove that he exercised no undue influence. This seems to us a clear adjudication, deciding the suit so far as the third charge is concerned. The fact that the learned Subordinate Judge intends hereafter to adjust the equities arising out of the contract does not in any way do away with his adjudication that the contract, as it stands, is not binding on the defendants. We think therefore that the Subordinate Judge’s order is a decree, and that the objection, that no appeal lies, must fail.

We turn now to the main point in dispute, namely, whether the defendants, who are the successors in interest of

Radhanath Mukherjee, are entitled to have the accounts relating to the further charge re-opened, on the grounds that the plaintiff ought to have had his bills of costs taxed, and that, as he did not have them taxed, they must be further examined before they can be accepted as sufficient consideration for the mortgage.

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Several English and Irish cases have been laid before us on this point. But in our opinion the authorities cited do not bear out the defendants' case. The contention of the defendants is that an attorney, being bound to have his bills taxed, is liable to have his bills re-examined, if he sues on a bond to pay a sum found on a settlement of untaxed bills to be due to him. Now, the decision in *In re Webb. Lambert v. Still* (1) is wholly against the contention, but the learned pleader for the respondent relies on *Lawless v. Mansfield* (2). That case certainly goes a great way in his favour, but it is not of so high an authority as the decision in *Lambert v. Still* (1), and even in *Lawless v. Mansfield* (2) all that was decided was that "where the relation of attorney and client subsists, in questions of accounts between the parties the common rule (that accounts will be re-opened only on errors being proved) does not prevail. Though the party only alleges generally that the accounts are erroneous, the Court will make a decree opening the accounts, if sufficient cause be shown." It is not laid down that the mere existence of the relation of attorney and client is sufficient, in the absence of all reasons for suspicion, to justify disregard of a formal contract and the re-examination of the accounts on which it is based. That the words "if sufficient cause be shown" are not mere surplusage was pointed out in *Morgan v. Higgins* (3) and in *Blagrove v. Routh* (4) it was held that what was said in *Lawless v. Mansfield* (2) was not meant to apply and could not apply to a mortgage for bills of costs only.

In our opinion, therefore, these cases do not justify us in holding, in the absence of evidence that there is anything open to suspicion in the third further charge that the plaintiff is

(1) [1894] 1 Ch. 73.

(3) (1859) 1 Gif. 270.

(2) (1841) 1 Dr. & War, 557; 53 R. R. 303. (4) (1856) 8 De.G. M. & G. 620.

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bound to show that the bills, for the payment of which the bond in suit was in part given, were just and reasonable.

Passing from the consideration of these cases, which after all are a safe guide in this country only in so far as they are in accordance with the provisions of the Contract Act, we may add that nothing in the Contract Act requires the re-opening of the accounts. Section 16 only presumes undue influence by a person in a position to dominate the will of another, when the contract appears on the face of it to be unconscionable. Section 111 of the Evidence Act throws upon a person standing in a fiduciary relation to another the burden of proving that he acted in good faith. The expression "good faith" is not defined in the Evidence Act, but to prove the good faith of a contract it certainly is not necessary to prove that all the accounts on which the contract is based are correct.

The main-stay of the respondent's case on this point is the decision in *Monohur Dass v. Romanauth Law* (1) already cited. Under the rules of this Court on the Original Side (Belchambers 328) attorneys have to have their bills taxed every year, and if an attorney receives payment for untaxed costs he is liable to be struck off the rolls. To this rule, however, there is a note affixed that the rule has not been observed since 1862, that in all cases taxation is deemed to be optional, and bills of costs are not infrequently adjusted without taxation. In the case cited the attorney offered to have these bills taxed, but his client refused. His client had no independent legal advice and was the client of the attorney till the latter sued on the mortgage which the former had given him for the amount due on his bills of costs, and he had a case before the attorney as arbitrator. It was held that the client was entitled to have the bills re-opened and taxed. In the present case, however, the attorney had done a good deal more than offer to have his bills taxed. He had filed the bulk of them in the taxing office, and he swears that he pressed his client during the considerable period that they lay in that office to have them examined. As he had paid the tax himself in advance, it is natural to suppose

that the delay in the examination of the bills was not due to him. Another point of difference between this case and that cited is that the client had independent legal advice, or at any rate the opportunity of getting it.

It appears to us that the defendants are bound to make out a *prima facie* case that the bills were extortionate, or at any rate incorrect, before they can ask the Court to re-examine them in a suit on a mortgage bond given for their discharge. We may say at the outset that they have failed in our opinion to make out any such case. The bills have been produced, but though the plaintiff has been subjected to a long and harassing cross-examination, not a question has been put to impugn the accuracy of the items in the bills. We might perhaps leave the matter there, but as it has been discussed at length we think that we should, in justice to the plaintiff, deal with the evidence on the other side, which in our opinion shows conclusively that the plaintiff took no advantage of Radhanath, but in fact treated him with liberality.

The negotiations which terminated in the third further charge began in April 1902. At that time Radhanath's property was in the hands of Mr. Belchambers, who had been appointed Receiver, as far back as 1895, in a suit brought by Raja Srinath Roy. The plaintiff swears that Radhanath at that time examined the accounts and the draft bills, the bulk of the original bills being in the taxing office, and agreed to pay Rs. 6,500 in full discharge of them, the sum of Rs. 7,093 being remitted by the plaintiff at the entreaty of Radhanath. This story is corroborated by the plaintiff's partner and by Satya Charan, Radhanath's mother's first cousin. This gentleman lives in a house of the plaintiff, and his independence is attacked. There is also a slight discrepancy as to whether the transaction was effected in the house or the office, but we attach no importance to it. It is probable that the business was not finished in a day and was discussed both at home and at office. If this evidence stood by itself we should consider it entitled to respect, even if it were not regarded as conclusive. The witnesses are respectable people, and their evidence stands wholly

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uncontradicted. But it does not stand by itself, but is, on the contrary, strongly corroborated by all the circumstances of the case. In the first place Radhanath was not the man to agree to pay Rs. 6,500 without good reason. An attempt has been made to represent him as incapable of business. But the evidence of Mr. Belchambers shows that he was a man of ordinary intelligence. He seems to have been always engaged in litigation. Priyanath, the principal witness for the defendants, says that he used not to listen to any one, and that though he took advice he did not act upon it. The description given of Radhanath by this witness suggests rather an obstinate, headstrong man, not prone to take advice and not likely to enter into agreements to pay large sums of money for the asking. Yet not only did he agree to the payment of Rs. 6,500 on account of these bills, but he repeated that agreement a year later, and during his life never showed any signs of desiring to resile from it. The further charge was recognised in a written statement filed by him a year later, in June 1904, and interest was paid on it up to July 1904, a few months before his death. It is not improbable that if he had lived, this defence would never have been set up. The bulk of the bills, as we have said, had long been deposited in the taxing office, and the tax had been paid in advance. No reason for depositing them there can be assigned except that the plaintiff desired to have them taxed. This fact itself suggests that the bills were not extortionate, for if the total of a bill is reduced by a sixth by the Taxing Officer, the attorney has to pay the whole tax. Included in the accounts of the third charge are some taxed bills, and the largest of them was reduced by 10 per cent. only. This is an indication, so far as it goes, that the plaintiff's bills, at any rate those sent in to the Taxing Officer, were not extortionate.

There is also another circumstance in the plaintiff's favour. The settlement of accounts was in April 1902. In the following month the estate of Radhanath was released from the charge of the Receiver, and handed over to the joint management of Radhanath and the plaintiff. The plaintiff was in

sole charge of the receipts and expenditure, paying Radhanath a fixed monthly allowance. This arrangement was of course favourable to the plaintiff, and it may reasonably be inferred that he and Radhanath had arranged together for the payment of Raja Srinath Roy, and the transfer of the estate from the Receiver to their hands. All this must have taken some time. It seems very unlikely that the plaintiff would have selected this occasion of all others to try to obtain Radhanath's assent to pay off his dues, if those dues were really extortionate. Radhanath might easily have discovered the fact, if really he was being cheated, and in that case the plaintiff's chances of obtaining with his aid joint possession of the property as security for his advances would have been seriously jeopardised. He had every reason at that time to keep Radhanath in good humour, an object which an untimely insistence or an extortionate bill would probably have frustrated. All these circumstances indicate that the bills were reasonable. No doubt if they had been taxed the sum of Rs. 13,593 would have been reduced probably by a sum between one and two thousands. But we have no doubt that Radhanath was greatly benefited by this agreement to pay only Rs. 6,500.

This suit, however, is not based on the promissory note for Rs. 6,500 which Radhanath executed in April 1902, but on the further charge which was executed 1½ years later. If really the promissory note was extortionate, it is difficult to believe that Radhanath would not have discovered the fact by July 1903. The conduct of the plaintiff at the time that the further charge was executed completely exonerates him in our opinion from any suspicion of bad faith. He advised Radhanath to consult another attorney and accordingly Radhanath went to Mr. J. C. Dutt. Mr. Dutt examined the draft, suggested alterations and examined the zemindari accounts. As to whether he examined the plaintiff's bills of costs, there is some conflict of evidence. Mr. Dutt says that he did so, while the plaintiff and his partner say distinctly that Mr. Dutt did not examine the bill. But it is possible that they may not have known the

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facts. The bills, if they were examined at all by Mr. Dutt, were examined by him at his own office and were brought to him by Radhanath. Radhanath may well have had some diffidence in re-examining bills which he had agreed to pay a year before and may have obtained them surreptitiously from the plaintiff's office. This is of course a mere conjecture, but some such conjecture is necessary to explain the facts. Not only does Mr. Dutt swear that he examined the bills, but it appears that this matter of Radhanath's liability for Rs. 6,500 on account of these bills was entered in the draft by Mr. Dutt himself, and it is difficult to see where he obtained this information if he was not consulted on this very point by Radhanath. The plaintiff evidently did not suggest the inclusion of this liability in the further charge.

Finally, it is not suggested that Mr. Dutt is in collusion with the plaintiff. There is nothing to rebut the plaintiff's statement that he did not advise Radhanath to consult any particular attorney. Radhanath apparently went to Mr. Dutt of his accord and consulted him. Even assuming that Mr. Dutt did not examine the bills there is nothing to show that the bills were withheld from him, or that he would not have been given full opportunities for examining them if he or Radhanath had asked to see them. In these circumstances, even if Mr. Dutt did not examine the bills, the fact is of no importance. An attorney may be bound in certain circumstances to advise his client to take independent advice. But when he has done so more cannot be required of him. It is not his business to see that the attorney selected by his client fulfils his duties to his client and is guilty of no remissness or negligence. If he sends his client to another attorney and is ready to comply with all reasonable demands for information, he cannot be expected to do more or to be responsible for another's omissions.

With regard to this question of the costs due to the plaintiff, it is urged that, though he received Rs. 7,100 from the Manager of the Junsi Estate as costs, he credited Radhanath with only Rs. 4,860. To this it is replied that the sum of Rs. 4,860 was

paid by the Receiver in advance, and when it was recovered from the Junsí Estate the sum was credited to Radhanath. The rest was due to the plaintiff as costs between party and party incurred after December 1901, and therefore had nothing to do with the account of the sum of Rs. 6,500 which related to costs between attorney and client incurred up to December 1901. The materials on the record do not justify any clear finding on this point, and therefore do not justify the re-opening of the account of the plaintiff's bills of costs.

We have no doubt that Radhanath was greatly benefited by the plaintiff's acceptance of Rs. 6,500 in full discharge of his bills of costs. We think that before the further charge, on which this suit was based, Radhanath had a full opportunity of taking legal advice on his liabilities, of which he availed himself as far as he and his adviser thought necessary. The case is therefore quite distinguishable from *Monohur Doss v. Romanauth Law* (1) which decision indeed proceeded on the special circumstances of the case rather than laid down any general principle of law. Taking this view, we find that the defendants are not entitled to have the accounts relating to the third further charge re-opened on the ground that the plaintiff's bills of costs were not taxed.

This is by far the most important point in the case and it is not necessary to discuss the other points at much length. The other items of the accounts are attacked in cross-appeal. With respect to the sum of Rs. 6,465 on account of interest on the former charges, it is said that if the payments of interest made by the Receiver had been credited on the days of payment, the sum due on this account would have been much less. On the other hand it is said that, as the mortgage and charges provided for the payment at certain rests, it was right to credit the money on the date of the rests and not on the days of payment. The matter has not been discussed by the Subordinate Judge. No account showing how interest has been over-charged, has been laid before us by the learned pleader for the respondents, and all that we need say on the matter is

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that we have been given no satisfactory reason for re-opening the account of interest given in the further charge.

As regards the sum of Rs. 14,870, it is urged that there is no proof of the appropriation of the money advanced on the hand-notes to the repairs of the embankment or to the payment of the rent. But most of these notes were executed before the estate was released from the control of the Receiver. The largest sum, namely, Rs. 6,100 was advanced in January 1903, after the estate had been released, but this was paid to satisfy the decree of Harendra Lal Roy, under which the property of Radhanath had been attached. We are informed that this was the property in suit, but the fact that this point has not been fought out in the trial of the case indicates that the opposition to these hand-notes is hopeless. The next largest sum, *viz.*, Rs. 4,100 was advanced while the estate was still in the Receiver's hands and is credited in the Receiver's book.

With respect to the payment of Rs. 6,163 on account of hand-notes executed by Radhanath in favour of Prakash Ghose, the plaintiff's grandson, it is urged that the hand-notes were not really paid off, and that as they were not endorsed by Prakash Ghose in favour of the plaintiff, the payment is not a valid consideration for the mortgage. The first point seems to us of no importance, even if we saw any reason for doubting the unrebutted evidence of the plaintiff and his grandson that the notes were paid off. It is perfectly clear that the money was due and that the parties met to arrange about its payment. If Prakash Ghose told Radhanath that on his executing the mortgage in favour of the plaintiff he (Prakash Ghose) would cancel the hand-notes and Radhanath agreed to this arrangement that would be a perfectly valid contract whether any money changed hands or not. As to the second point, it does not arise at all. It has been pointed out that an assignment of a negotiable instrument can only be effected by endorsement. But here notwithstanding an inaccurate remark in the further charge, there was never any question of an assignment at all. The parties did not wish to negotiate the note, but to put an end to it; and to say that a negotiable instrument

can only be put at and to by endorsement, is obviously incorrect.

Another objection raised is that the plaintiff had no right under the order of this Court of the 22nd May 1902, to devote a portion of the sum of Rs. 14,452 in his hands to the payment of his bills for Rs. 6,500, as that order authorised the plaintiff to manage the property with Radhanath and to apply the balance of the income after the charges had been paid to the payment of his incumbrances. But, in the first place, the order was an enabling order. It authorizes the plaintiff to apply the balance to his incumbrances, but it did not render it obligatory on him to do so. Secondly, it is clear that there was no real balance at all, and consequently no portion of the balance was applied to the payment of the plaintiff's bills. The plaintiff had advanced at least Rs. 14,870, a sum in excess of the amount of Rs. 14,452 in his hands, towards the expenses of the estate, and had no balance over to apply to his mortgage.

We think, therefore, that all the grounds put forward for re-opening the accounts relating to the further charge fail. The result is that an account will be taken of what will be due to the plaintiff or account of the mortgage and three further charges with interest and costs of both Courts on the 7th February 1909. If the defendants fail to pay this sum on or before that date, the plaintiff will be entitled to sell the property hypothecated to him in the usual way.

The decretal amount will bear interest at the rate of 6 per cent. after the said date.

The cross-appeal will be dismissed with costs.

Appeal allowed.

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MATHURA NATH ROY CHAUDHURI

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Appeal—Bengal Tenancy Act (VIII of 1885), ss. 106, 109A—Civil Procedure Code (Act XIV of 1882), ss. 558, 560—Appeal from Order under s. 106 of the Bengal Tenancy Act, if lies to High Court.

Section 588 of the Code of Civil Procedure does not apply to orders under s. 106 of the Bengal Tenancy Act.

Held, further, that s. 109A, sub-section (3) of the Bengal Tenancy Act limits the power of the High Court to the hearing of second appeals and not appeals from orders either under s. 558 or s. 560 of the Code of Civil Procedure.

Mothur Chandra Majumdar v. Tara Sunkar Ghose (1) relied on.

APPEAL by the petitioners, Mathuranath Roy Chaudhuri and others, for revival of appeal in the lower Court.

An appeal under section 109A of the Bengal Tenancy Act was filed in the Court of the District Judge of Backerganj on the 31st January 1907. The hearing of the appeal was fixed for the 18th April. On that date the appeal was not heard for want of time and the Court fixed the 3rd May for hearing of the appeal. The appeal was dismissed on the latter date in default of the appellants. A petition for revival of the appeal was filed on the 9th May and was rejected on the following day. The appellants, thereupon, filed this appeal against the order dismissing the application.

Babu Gunada Charan Sen, for the respondents, took a preliminary objection to the hearing of the appeal contending that section 588, C. P. C., did not contemplate appeals in such cases.

* Appeal from Order, No. 325 of 1907, against the order of J. D. Cargill, District Judge of Backerganj, dated May 10, 1907.

(1) (1903) 7 C. W. N. 440.

Babu Janaki Nath Pal, for the appellants. The recent case of *Hare Krishna Mahanti v. Bhusan Chandra Mahanti* (1) is in my favour.

[MITRA J. The case you cite is inapplicable. It was a case under the old Act.]

MITRA AND CHITTY JJ. A preliminary objection has been taken to the hearing of this appeal on the ground that section 588, Code of Civil Procedure, does not apply to proceedings under section 106 of the Bengal Tenancy Act. Section 109(A), sub-section 3, confines the power of the High Court to the hearing of second appeals and not appeals from orders, either under section 558 or section 560. In *Mothur Chandra Majumdar v. Tara Sunkar Ghose* (2) this Court declined to allow an appeal from an order under section 562, Code of Civil Procedure, made by a special Judge exercising the powers given to him by section 109 (A). The same principle also applies to this case. We accordingly dismiss this appeal with costs.

Appeal dismissed.

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(1) (1908) 12 C. W. N. 888.

(2) (1903) 7 C. W. N. 440.

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Nov. 13.

Appeal—Bengal Tenancy Act (VIII of 1885), ss. 106, 109A—Civil Procedure Code (Act XIV of 1882), ss. 558, 560—Appeal from Order under s. 106 of the Bengal Tenancy Act, if lies to High Court.

Section 588 of the Code of Civil Procedure does not apply to orders under s. 106 of the Bengal Tenancy Act.

Held, further, that s. 109A, sub-section (3) of the Bengal Tenancy Act limits the power of the High Court to the hearing of second appeals and not appeals from orders either under s. 558 or s. 560 of the Code of Civil Procedure.

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MITRA AND CHITTY JJ. A preliminary objection has been taken to the hearing of this appeal on the ground that section 588, Code of Civil Procedure, does not apply to proceedings under section 106 of the Bengal Tenancy Act. Section 109(A), sub-section 3, confines the power of the High Court to the hearing of second appeals and not appeals from orders, either under section 558 or section 560. In *Mothur Chandra Majumdar v. Tara Sunkar Ghose* (2) this Court declined to allow an appeal from an order under section 562, Code of Civil Procedure, made by a special Judge exercising the powers given to him by section 109 (A). The same principle also applies to this case. We accordingly dismiss this appeal with costs.

Appeal dismissed.

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(1) (1908) 12 C. W. N. 888.

(2) (1903) 7 C. W. N. 440.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Harington and Mr. Justice Brett.

*In re H. R. COBBOLD, AN INSOLVENT.**

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Nov. 23.

Insolvency—Indian Insolvent Act (11 and 12 Vict., c. 21), s. 73—Practice—Appeal by petition—Petition by creditor not included in schedule—Jurisdiction of High Court in its Appellate Jurisdiction—Distribution of Dividends.

On an application for relief under section 73 of the Insolvent Act, to the High Court in its appellate jurisdiction by a creditor, whose claim at the time of the final discharge was by some inadvertence not entered in the schedule, the insolvent, however, having notice of and acknowledging the claim and knowing of the omission:—

Held, that the High Court, in its appellate jurisdiction, had jurisdiction to intervene, and to order that the creditor be entered in the insolvent's schedule, and that he do rank as creditor, as well in respect of past as of future dividends.

INSOLVENCY.

THIS was an application to the Appeal Court, under section 73 of the Insolvent Act, made by the Milwaukee Bag Company whose name was not included in the insolvent's schedule of creditors, as a party "aggrieved" by the order of final discharge of the insolvent.

The Milwaukee Bag Company was an American Company carrying on business at Milwaukee in the United States of America.

On the 2nd April 1906, Henry Ralph Cobbold filed his petition in Insolvency, and thereupon a vesting order was made, directing that the estate and effects of the insolvent be vested in the Official Assignee. On the 4th September 1906, the insolvent filed his schedule of creditors omitting, however, the name of the Milwaukee Bag Company whose claim against the insolvent amounted to 39,292 dollars, the equivalent of over Rs. 1,22,000. On the 3rd February 1907,

* Appeal from Original Civil, No. 11 of 1908.

the insolvent was granted his personal discharge, and on the 7th February 1907, an order *nisi* was made for his final discharge.

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In May 1907, the American Company instructed a firm of solicitors in Calcutta, in connection with their claim, and subsequently forwarded to them an affidavit in proof of their claim. On the 3rd September 1907, the affidavit of claim was submitted to the Official Assignee who, however, replied that as the claim had not been entered in the insolvent's schedule an order of Court would be necessary to entitle the Company to rank as creditors. On the 5th September 1907, the affidavit of claim was forwarded by the solicitors of the creditor Company to the insolvent's solicitors. On the 9th January 1908, the latter replied that the insolvent had considered the claim and would admit it subject to the creditor Company undertaking to assent to his final discharge when the proper time came, and on the 23rd January 1908, they returned the affidavit of claim to the solicitors of the creditor Company. On the 28th February 1908, the Company's solicitors forwarded to the insolvent's solicitors for approval an engrossed form of petition for the amendment of the schedule of the insolvent by the inclusion of the Company's claim, so as to enable the Company to obtain the benefit of any dividend declared or to be declared by the Official Assignee out of the insolvent's estate.

On the 3rd March 1908, the insolvent through his solicitors applied for his final discharge and thereupon an order was passed by Fletcher J. making the order *nisi* absolute.

On the 11th March 1908, the insolvent's solicitors returned the petition of amendment of the creditor Company to the latter's solicitors with a letter in the following terms: "We find ourselves in a very awkward position, as before signing your petition we thought it necessary to send same to the Official Assignee for inspection and he did not return same until after final discharge had been applied for and granted, and he now says that it is too late to amend the schedule. We now return

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the petition signed and shall be glad to assist you in any way we can in getting the schedule amended."

Thereupon, the Milwaukee Bag Company made the present application, praying *inter alia*, (i) that the order of final discharge, dated the 3rd March 1908, may be cancelled and that the petition of the insolvent for final discharge may be returned to the Insolvent Court for re-hearing, (ii) that the Company may be entered in the insolvent's schedule as creditors to the amount of 39,292 dollars and rank as creditors for the purpose of receiving future dividends, (iii) that the Official Assignee may be directed out of moneys in his hands belonging to the insolvent's estate to pay to the Company past dividends upon their debt at the same rate as the dividends paid upon debts already proved before any further dividend is declared or paid.

Mr. Gregory (*Mr. Camell* with him), for the creditor Company. At the time of applying for and obtaining his final discharge, the insolvent had full notice of the Company's claim, and full knowledge that the Company had not been included in the schedule of creditors. The Company took all the steps necessary to have their claim included, and through some inadvertence this was not done. One of two courses was open to the creditor Company: to come in and prove their claim under section 41 of the Insolvent Act, or to appeal by petition under section 73, from the order of final discharge as "persons aggrieved." It is not desired to open up the insolvency proceedings by pressing for the cancellation of the order of final discharge, unless it be necessary. The creditor Company would be satisfied with an order in terms of prayers 2 and 3 of their petition.

Mr. Stokes, for the insolvent, consented to an order being made in terms of prayers 2 and 3 of the petition.

MACLEAN C.J. This really is not an appeal from a decision of Mr. Justice Fletcher, for he passed no order in the matter. It is an application under section 73 of the Insolvent Act and we have ample jurisdiction to make the order which we propose

to do. The Official Assignee has not appeared before us but the insolvent has and he does not object to the order.

It is quite clear from the correspondence and the evidence in the case that the present appellants considered that they ought to have been entered in the schedule of the creditors in respect of the amount they claimed and those who represented the Official Assignee took the same view, and in fact a petition was presented for amending the schedule in that respect. It appears, however, that the application for the final discharge of the insolvent came on, on the 3rd of March in this year and apparently the matter escaped the attention of the parties and of the Court and nothing was done in the matter. The creditors, the present appellants, now come and ask us to intervene under section 73 of the Insolvent Act. We think justice demands that that should be done, and, the appellants not desiring to cancel the order of discharge, and we think properly, an order should be made in terms of prayers 2 and 3 of their petition.

The costs of both parties may be paid out of the estate in the hands of the Official Assignee.

HARINGTON AND BRETT JJ. concurred.

Application allowed.

Attorney for the appellant : *S. S. Hodson.*

Attorneys for the respondent : *Orr, Dignam & Co.*

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APPEAL FROM ORIGINAL CIVIL.

*Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice
Harington and Mr. Justice Fletcher.*

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SOUTH BRITISH FIRE AND MARINE INSURANCE Co.

v.

BROJO NATH SHAHA.*

*Marine Insurance—Inland Navigation—Construction of Policy—Warranty—
Condition precedent—Impossibility of Performance—Exception from Risk
—Onus probandi—Waiver—"Month," meaning of, in a contract—"Lunar
Month"—General Clauses Act (X of 1897), s. 3, (33)—Limitation Act (XV
of 1877), s. 25.*

A policy of insurance covering a cargo of jute on the voyage from Ghiur to Calcutta against the adventures and perils of rivers and inland navigation including fire risk, contained, *inter alia*, the following conditions and warranties:—

"It is further warranted:—

"2. That the risk of loss or damage by fire is not insured hereby unless expressly so stated in writing hereon, in which case such fire risk shall be subject to the following additional conditions:—

"(a) Any loss occasioned by smoking or cooking having been carried on in the said boat shall not be recoverable hereunder.

"8. That no smoking nor cooking shall be carried on in the said boat, but in a dinghy provided for the purpose.

"9. That in the event of loss:—

"(a) The Manji or Charandar *must* report to the nearest Police Station within 24 hours and must state that the cargo is insured.

"(f) It is furthermore hereby expressly provided, that no suit or action of any kind against the said Company for the recovery of any claim upon, under or by virtue of this policy, shall be sustainable in any Court of law or equity unless such suit or action shall be commenced within the term of six months next after any loss or damage shall occur; and in case any such suit or action shall be commenced against the said Company after the expiration of six months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced."

In an action on the policy instituted by the assured, it was alleged in the plaint which was filed on the 15th April 1907, that the cargo was destroyed by fire on the 14th October 1906:—

Held, that the term “warranty” as used in a policy of Marine Insurance is used to denote two different kinds of conditions: (i) a condition to be performed by the assured, and (ii) an exception from or limitation on the general words of the policy. In the first case the warranty is a condition precedent to the policy, whether it be precedent to the effectual making of the policy, or precedent to the accrual of the right to sue thereon, or whether it declares the events in which forfeiture ensues, or deals with the mode of settling disputes, or limits the period for bringing a claim: in all such cases, whether the conditions be material to the risk or not, they must unless waived be fulfilled with the most scrupulous exactness, and if not so fulfilled, there is a breach of an express stipulation which is one of the essential terms of the contract and the insurer is discharged from liability as from the date of the breach of warranty: the assured must prove that he has complied with all such warranties as being conditions precedent to the policy attaching, or that the performance thereof has been effectually waived.

Pawson v. Walton (1), *Thomson v. Weems* (2), *Barnard v. Faber* (3) referred to.

The warranty in clause 2 (a) was an exception from the risk which the insurers were willing to undertake, and under it the onus of proving that the cargo was destroyed by fire, caused by cooking or smoking, would lie on them.

Boyd v. Dubois (4) referred to.

Clause 8 was a condition precedent to the liability of the insurers under the policy, and the onus of proving compliance was on the assured.

Clause 9 (a) was similarly a condition precedent: the fact that the condition might be impossible of fulfilment could not affect the liability.

Worsley v. Wood (5) and *Law v. George Newnes* (6) referred to.

Notwithstanding the provisions of the General Clauses Act and the Indian Limitation Act, the term “month” in a contract, means in India, as in England “lunar month” and not “calendar month.”

Simpson v. Margetson (7), *Turner v. Barlow* (8), *Bruner v. Moore* (9), and *Hart v. Middleton* (10) referred to.

Clause 9 (f) was a condition precedent and had not been complied with.

Semle, even if the term “month” in the policy meant “calendar month,” the plaintiff was out of time.

Radcliffe v. Bartholomew (11) referred to.

APPEAL by the defendant Company from the judgment of Chitty J.

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(1) (1778) 2 Cowp. 785.

(2) (1884) L. R. 9 App. Cas. 671, 684.

(3) [1893] 1 Q. B. 340, 344.

(4) (1811) 3 Camp. 133.

(5) (1796) 6 T. R. 710.

(6) 31 Sc. L. R. 888.

(7) (1847) 17 L. J. Q. B. 81.

(8) (1863) 3 F. & F. 946.

(9) [1904] 1 Ch. 305

(10) (1845) 2 C. & K. 9

(11) [1892] 1 Q. B. 161.

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This was an action for the recovery of the sum of Rs. 11,630, the value of a cargo of jute covered by a policy of insurance issued by the appellant Company, and alleged to have been lost by fire.

The plaintiff Brojo Nath Shaha alleged that on the 14th September 1906, he loaded 977 drums of jute, valued at Rs. 11,629-11-9, in a boat at Ghiur in the District of Dacca and on the following day despatched the same to Calcutta in charge of manjee, Chandra Das.

On the 11th October 1906, the plaintiff Brojo Nath Shaha effected a policy of insurance with the South British Fire and Marine Insurance Company in the sum of Rs. 11,630 "being the value of 977 drums of jute including fire risk in the *Good Country Cargo Boat* No.——whereof Mohim Chandra is manjee and——, the assured's charandar, beginning the adventure upon the aforesaid interest from the loading thereof on board the said boat at as aforesaid, and continuing during the time of voyage as aforesaid until landed or if not landed, until 3 clear working days after the arrival of the said boat at destination (if Calcutta within the limits of the Port) whichever may first occur." The adventures and perils which the Company agreed to bear and take upon itself in that voyage were "of the Rivers, Fire and of all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said subject-matter of this Insurance or any part thereof arising from the Perils of the Rivers and Inland Navigation.

The policy was made expressly subject, *inter alia*, to the following conditions and warranties, endorsed on the face of the policy :—

"Warranted free from average, unless caused by the boat being stranded, sunk or in collision with another boat or vessel.

"It is further warranted :—

2. "That the risk of loss or damage by fire is not insured hereby unless expressly so stated in writing hereon, in which

case such fire risk shall be subject to the following additional conditions :—

“(a) Any loss occasioned by smoking or cooking having been carried on in the said boat shall not be recoverable hereunder.

5. “That the assured shall provide a charandar on the said boat, and that the interest hereby insured shall be in his charge.

6. “That the assured shall provide the manjee or charandar of the said boat, before commencement of the voyage, with a sufficient sum of money to enable them to obtain labour and assistance in the event of accident during the voyage.

8. “That no smoking nor cooking shall be carried on in the said boat, but in a *dinghy* provided for the purpose.

9. “That in the event of loss :—

“(a) The manjee or charandar *must* report to the nearest Police Station within 24 hours and must state that the cargo is insured.

“(b) After report has been made to the Police, the manjee, charandar and two of the crew of the said boat shall proceed at once to Calcutta and report themselves to the Company, and shall thereupon make a declaration or statement regarding the said loss.

“(c) The assured shall within seven days of the happening of such loss furnish to the Company a true and faithful statement and detailed account of such loss (on form obtainable from the Company) shewing where and how such loss occurred.

“(d) The assured shall furnish and produce to the Company such further evidence, books of account or documents as they may reasonably require, and should such evidence, books of account or documents not be produced, the assured, shall forfeit his rights of recovery under this policy.

“(e) Should any false statement, overcharge, imposition, or misrepresentation be made by the assured, he shall forfeit all rights of recovery under this policy.

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“(f) It is furthermore hereby expressly provided, that no suit or action of any kind against the said Company for the recovery of any claim upon, under, or by virtue of this policy, shall be sustainable in any Court of law or equity unless such suit or action shall be commenced within the term of six months next after any loss or damage shall occur; and in case any such suit or action shall be commenced against the said Company after the expiration of six months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.”

Premium at the rate of 3½ per cent., as stipulated in the policy, was duly paid by the plaintiff to the Insurance Company.

On the evening of the 14th October 1906, the boat arrived at Khager Chur, near Budartuni Thannah in the District of Barisal. It was alleged in the plaint, that while at Khager Chur, on the 14th October, the boat and the cargo of jute were totally destroyed by fire, and that the plaintiff's cause of action arose on the 14th October. The evidence given on behalf of the plaintiff, however, fixed the time of occurrence of the fire between the late hours of the night of the 14th October and 2 A.M. of the 15th October. It appears that Mohim Manji was the first to discover the fire; he aroused the rest of the crew, but in spite of their efforts to extinguish the fire, it took hold of the jute and the crew were forced to escape to the shore in a *dinghy*. The boat with the cargo of jute eventually sank. That night the crew remained on shore.

On the morning of the 15th October, the manji and two or three of his men proceeded to look for the sunken vessel: but they could discover only the blade of the rudder. The manji and crew spent the night of the 15th October at the house of a chowkidar, and on the morning of the 16th October at 8 A.M. they made a report at the Thannah at Budartuni. The fol-

lowing passage occurred in the report : " On the night of the 14th October they were near Khager Chur in the river Meghna ; at about midnight, somehow or other the fire of the earthen pot having caught the jute in the boat burnt all the jute in the boat together with the boat itself, the remaining portion of the boat being sunk in the said river. The whole of the jute is burnt, all of them reached the bank in the *dinghy* which was with the boat and saved their lives. They do not know exactly how much worth of jute was in the boat."

On the same day, the plaintiff received a telegram from the manji Mohim Chandra in the following terms :—" Jute boat fixed Sunday last Badar Chur, Thana Budartuni." On the 17th October the plaintiff gave information of the loss to the defendant Company, who understood from the terms of the telegram that the boat had got aground. On the 20th October, however, the plaintiff heard by letter from Mohim that the boat had been burnt and this he communicated to the Insurance Company. On the 22nd October, the latter wrote to the plaintiff to send the manji to Messrs. Landale and Clark's office at Chandpur, so that full particulars of the accident may be furnished to them, and to arrange to bring down the crew and the books of account in connection with the purchase of the jute at Ghiur. It appears that on the 3rd November 1906, the manji, Mohim Chandra, presented himself before the Manager of Messrs. Landale and Clark at Chandpur, who after enquiring into the matter reported that from what he could gather, there appeared to have been no foul play.

The suit was instituted on the 15th April 1907. The Insurance Company in their defence raised a substantive case of an attempt by the plaintiff to defraud them. They denied that the plaintiff shipped the jute in question or that the boat referred to in the policy was destroyed by fire, and charged that the plaintiff with intent to defraud the Company, purchased an old and rotten cargo boat for Rs. 60 near Goalundo and loaded the same with earth and a small quantity of damaged jute, which had been salvaged from a country boat which had sunk near Faridpur, and a small quantity of other jute, and caused

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the boat and its cargo to be set on fire and sunk at Khager Chur. The Insurance Company took the further defence that the conditions of the policy and in particular conditions 5, 9 (a), 9 (b), 9 (c) were not complied with.

Chitty J., believing the evidence adduced on behalf of the plaintiff, gave a decree for the sum of Rs. 11,630 on the 26th of August 1907. After discussing the facts and evidence in the case, his Lordship concluded as follows :—

“ I accept then the story of the plaintiff as to the shipment and the loss, and the only question that remains is whether he is precluded from recovering the amount due on the policy by reason of its conditions. Now the conditions relied upon are those contained in the margin of the policy and numbered 9 (a) (b) (c).

No. 9 has six sub-divisions and the last three (d) (e) (f) distinctly provide that by a breach of the condition the assured shall forfeit his rights of recovery under the policy. The first three clauses do not contain any such provision and it is obvious why they should not. The first is that the Manji or Charandar must report to the nearest Police station within 24 hours and state that the cargo is insured.

Well here there might be no Police station within twenty four hours' distance or the Manji or Charandar or both might be drowned. It might be a condition impossible of fulfilment. The next is as to the Manji and crew proceeding to Calcutta. In this case that condition was clearly waived because the enquiry was to be held in the first instance at Chandpore. The report was made in Calcutta by the plaintiff himself, and the Company certainly did in their first letter say that the crew should be required to attend but afterwards apparently they raised the charge of fraud and the crew were not asked to come down here.

So also with regard to provision (b) an offer of the books was made to the defendant Company but Hari Babu the clerk who interviewed the plaintiff and his agent said it was of no use producing them then.

It appears to me, however, that the absence from these three provisions of the clause as to forfeiture clearly shews that they were not to be regarded as conditions precedent. After Counsel for the plaintiff had replied, some cases were quoted by Counsel for the defendant Company with regard to Marine Insurances and warranties in such policies, but it appears to me that they have no application to the present case. There must therefore be a decree for the plaintiff for Rs. 11,630 and costs on Scale No. 2. Interest on judgment at six per cent.”

From this judgment the defendant Company appealed.

Mr. Dunne (The Advocate-General, *Mr. Garth* and *Mr. Pugh* with him), for the appellant Company. The plaintiff's claim

cannot be supported on two grounds : *first*, on the evidence it is clear the claim was entirely fraudulent ; *secondly*, the assured did not fulfil the conditions and warranties appearing on the face of the policy, especially those contained in clauses 2, 5, 8 and 9. A condition whether material to the risk or not must, unless waived, be strictly fulfilled as a condition precedent to the right of the assured to recover, and if not so fulfilled the insurer is discharged from liability as from the date of breach. Where performance of a condition is traversed by the defendant, the onus lies on the plaintiff to prove such performance, unless he can prove waiver. Condition 5 was not performed by the assured. As regards condition 8, it was proved there was an earthen pot containing fire on board, which could be used only for cooking or smoking purposes : the onus was thrown on the plaintiff to shew that the loss was not due to fire caused by cooking or smoking. Conditions (a), (b), (c), (d) contained in clause 9 were not performed. [Fletcher J. By clause 9 (f) it is provided that no suit against the Company shall be sustainable upon the policy, unless commenced within six months next after any loss shall occur ; if the word " month " be taken to mean a " lunar " month, the suit is clearly out of time.]

It is a recognised rule of construction in England, except in cases of mercantile contracts within the city of London, that " month " means " lunar month." The onus does not lie on me to prove that in India, we come within the rule and not within the exception. The ordinary meaning of " month " in English is " lunar month " and not the artificial month in the Gregorian Calendar. Section 25 of the Limitation Act can have no application as was pointed out by Ameer Ali J. in *LatiJunessa v. Dhan Kunwar* (1) in considering *Rungo Bujaji v. Babaji* (2). There was no question here of limitation by statute, but the time within which an action could be brought was limited by contract between the parties. Even if " month " be construed to mean " calendar month " the plaintiff was out of time. The cause of action was expressly stated in the

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(1) (1897) I. L. R. 34 Calc. 382, 385.

(2) (1881) I. L. R. 6 Bom. 83.

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plaint as having arisen on the 14th October 1906, and the
plaint was dated the 15th April 1907.

Mr. Hill (*Mr. B. C. Mitter* with him), for the respondent.
Assuming that "month" means "calendar month," it is
submitted the plaintiff was within time. The day on which
the cause of action arose must be excluded in the computation
of the six months: *Goldsmiths, Company v. West Metro-*
politan Railway (1), also section 12 of the Limitation Act.
[*Fletcher J.* referred to *South Staffordshire Tramways Com-*
pany v. Sickness and Accident Assurance Association (2).]

Moreover, inasmuch as the 13th and 14th April 1907 were
Court holidays, and the plaint was filed on the 15th April, it
is submitted the plaintiff was in time: *Shooshee Bhuran*
Rudro v. Gobind Chunder Roy (3) and *Surendra Narayan*
Mustafi v. Souravini Dasi (4). The question of construction
as to whether "month" means a "lunar month" or a "calen-
dar month" is one of evidence and dependent on the inten-
tion of the parties. It has always been the practice, and it
is submitted the intention of the parties to the present
policy must have been, to regard "month" as "calendar
month." In England the term "month" has been construed
to mean "calendar month" in policies of Fire Insurance and
Mercantile Documents in general: see *Porter on Fire Insur-*
ance, 3rd edition, page 200, and *Norton on Deeds*, page 158;
see *Craies on Statute Law*, 4th edition, page 150: "Unless a
contrary intention appears, 'month' means 'calendar month'
in every Act passed after 1850, and in contracts for the sale
of goods it is presumed to have the same meaning."

[*Fletcher J.* In England, the general rule of construction
is that "month" means "lunar month" the only excep-
tion judicially recognised is with reference to mercantile trans-
actions in the city of London: *Norton on Deeds*, page 159
and *Bruner v. Moore* (5). Also it follows from the passage
quoted from *Craies*, that before the rule was amended by the
statute of 1850, "month" meant "lunar month."]

(1) [1904] 1 K. B. 1, 4.

(2) [1891] 1 Q. B. 402.

(3) (1890) I. L. R. 18 Calc. 231.

(4) (1906) 3 C. L. J. 339.

(5) [1904] 1 Ch. 305.

The rule of construction in England does not necessarily apply here. Section 25 of the Indian Limitation Act provides that reference *shall* be made to the Gregorian Calendar.

It would appear that the warranties appearing on the face of the policy were conditions : *Barnard v. Faber* (1). But the question is whether they were conditions precedent ? It is submitted they were not, on the authority of *Stoneham v. Ocean Railway and General Accident Insurance Company* (2).

[Fletcher J. Rules of construction governing a policy of Life Insurance, can have no application to a policy of Marine Insurance.]

There is internal evidence in the policy as to which conditions were intended by the parties to be conditions precedent, viz., the conditions with clauses providing forfeiture attached—condition 9, clauses (d), (e), (f). It is submitted the other conditions in the policy were not conditions precedent. Where it was intended to contest the performance of a condition precedent, the duty lay on the defendant Company to specifically plead it : see Judicature Act, Order 19, rules 14, 15, Civil Procedure Code, section 114. A general traverse in the written statement that the conditions precedent had not been performed by the plaintiff, would not avail the defendant.

The defence under condition 9 (f) was not pleaded in the written statement, nor raised in argument in the Court of first instance, nor in the memorandum of appeal. A condition precedent can be waived and it is submitted that by pleading over, the defendant Company has waived the condition. It is submitted there has been waiver of condition 9 (b), (c) and (d). [Fletcher J. If a condition precedent has not been performed, it lies on the plaintiff to specifically plead waiver.] The general rule is that the onus of proof lies on him who asserts a fact, and not on him who denies it. The onus of proof here lay on the insurers : *Aga Syud Saduck v. Hajee Jackariah Mahomed* (3) and *Rucker v. Green* (4).

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(1) [1893] 1 Q. B. 340, 342.

(2) (1887) L. R. 19 Q. B. D. 237

(3) (1869) 2 Ind. Jur. 208

(4) (1819) 15 East 288

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On the question of onus, there is good reason why there should be a difference between marine policies and others—as the underwriters may be ignorant of the circumstances prevailing at a foreign port, where loss may occur. It is submitted that the present policy was not a marine but an accident policy, as the adventures and perils insured against were those arising from the perils of the rivers and inland navigation. Under general principles of insurance law, the onus lay on the insurers to prove their exemption from liability: *Thomson v. Weems* (1), *Leete v. The Gresham Life Insurance Society* (2), *Bunyon's Law of Life Assurance*, 4th edition, page 126, and *Bunyon's Law of Fire Insurance*, 5th edition, page 96. The onus lay on the defendant Company to prove the substantive case of fraud they made: *Thurtell v. Beaumont* (3) and *Sooriah Row v. Cotaghery Boochiah* (4).

[Fletcher J. referred to *Muirhead v. Forth and North Sea Steam Boat Mutual Insurance Association* (5).]

Mr. Garth, in reply. The present policy is clearly one of marine insurance. Authorities on other kinds of insurance have no application to a policy of marine insurance.

Cur. adv. vult.

MACLEAN C.J. This is an appeal by the defendants from a judgment of Chitty J.

The suit was brought by the plaintiff against the defendants to recover the sum of Rs. 11,630 under a policy of assurance issued by the defendants in favour of the plaintiff, on a cargo of jute said by the plaintiff to have been shipped at Ghiur on the 14th September 1906, and which the plaintiff alleges by his plaint was subsequently destroyed by fire on the night of 14th October 1906.

The policy in question which is dated the 11th October 1906 provides that, subject to the conditions and warranties

(1) (1884) L. R. 9 A. C. 671.

(3) (1823) 1 Bing. 339.

(2) (1851) 15 Jur. 116.

(4) (1838) 2 Moo. I. A. 113, 124.

(5) (1893) 10 T. L. R. 82.

herein specified, the defendants assured the cargo consisting of 977 drums of jute of the value of Rs. 11,630 on a voyage from Ghiur to Calcutta against the risks and the perils of the voyage including fire risk.

The warranties endorsed on the face of the policy so far as material are as follows :—" It is further warranted (2) that the risk of loss or damage by fire is not insured hereby unless expressly so stated in writing hereon in which case such fire risk shall be subject to the following additional conditions :—(a) Any loss occasioned by smoking or cooking having been carried on in the said boat shall not be recoverable hereunder.

8. That no smoking nor cooking shall be carried on in the said boat but in a dinghy provided for the purpose.

9. That in the event of loss—

(a) the Manjee or Charandar must report to the nearest police station within 24 hours and must state that the cargo is insured.

(b) After report has been made to the police the Manji, Charandar and two of the crew of the said boat shall proceed at once to Calcutta and report themselves to the Company and shall thereupon make a declaration or statement regarding the said loss.

(c) The assured shall within 7 days of the happening of such loss furnish to the Company a true and faithful statement and detailed account of such loss (on form obtainable from the Company) showing where and how such loss occurred.

(f) It is furthermore hereby expressly provided that no suit or action of any kind against the said Company for the recovery of any claim upon, under or by virtue of this policy shall be sustainable in any Court of Law or Equity unless such suit or action shall be commenced within the term of six months next after any loss or damage shall occur and in case any such suit or action shall be commenced against the said Company after the expiration of six months next after such loss or damage shall have occurred the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced."

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The defendants by their written statement first deny that the plaintiff shipped the jute in question; secondly, that the boat referred to in the policy was destroyed by fire; thirdly, they charge that the plaintiff with intent to defraud the defendants purchased an old and rotten cargo boat for Rs. 60 near Goalundo, and thereafter placed the same in the charge of Manji Mohim Chandra Dass and loaded the same with earth and a small quantity of damaged jute that had been salvaged from a country boat which sank near Faridpore and a small quantity of other jute and caused the said boat and its cargo to be set on fire and sank at Khager Chur on or about 14th October 1906; fourthly, the defendants did not admit that the conditions of the policy were complied with and in particular they do not admit—(a) that there was a Charandar on board and in charge; (b) that a report was made to the nearest police station within twenty-four hours stating that the cargo was insured, (c) that the Manji, Charandar or any of the crew proceeded to Calcutta, (d) that no detailed account was furnished within seven days, (e) that the boat was a good cargo boat.

This suit, which was instituted by the plaintiff on the 15th April 1907, came on for hearing before Chitty J., and on the 26th August 1907, the learned Judge gave judgment for the plaintiff for the amount claimed. Against this decision, the defendants have appealed.

Now, the story as told by the plaintiff and his witnesses is as follows:—The plaintiff is a trader in jute and other commodities at a place called Ghiur.

The plaintiff alleges that the cargo of jute covered by the policy was placed on board the boat of one Mohim Chandra Dass between the 31st August and 14th September 1906, a portion of the jute being placed on board in the canal at Ghiur on which the plaintiff's premises abut, the boat there owing to the shallowness of the water in the canal being then taken out into the river where the remainder of the jute was placed on board. This boat according to the evidence on behalf of the plaintiff had been purchased by Mohim from one Gopeswar

a few days prior to the date on which the jute was begun to be loaded.

On the 15th September the challan having been given to the Manji the boat started and on same day reached Raipore, where for a period of seven or eight days the boat was held up by stress of weather. The crew on board consisted of the Manji Mohim and four others and there was also a Charandar Hazari Duffadar.

The plaintiff also says that one Rameswar Chowdhry and his man accompanied the boat in their own dinghy for the purposes of making the soundings necessary for the safe navigation of the boat, and further that a dinghy was also attached to the boat for the purpose of cooking as required by the terms of the policy.

On the evening of the 14th October the boat arrived at Khager Chur.

At some time between the late hours of the night of the 14th October and two o'clock in the morning of the 15th October Mohim, the Manji, awoke and found the boat on fire. He immediately aroused the rest of the crew, but despite all their efforts the fire took hold of the jute, and they were forced to abandon their efforts and escape to the shore in the dinghy. The fire on the boat continued and eventually the boat sank. The Manji and crew spent the rest of the night or rather the early morning on the banks of the river bemoaning their fate.

On the morning of the 15th October the Manji and two or three of his men proceeded to look for the sunken vessel, the only trace, however, that they could find of it was a blade of the rudder.

The Manji and crew spent the night of the 15th at the house of one Ishan Ali, a Chowkidar, and on the morning of the 16th at 8 A.M. they made a report at the thanah at Badartuni. This report and the time of making it are of some importance, and we shall refer to this report more in detail at a later stage of our judgment.

On the same morning the Manji telegraphed to the plaintiff at Calcutta, informing him that the boat had been "fixed,"

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the word "fixed" as sent in the telegraphic despatch is an obvious error for "fired."

The plaintiff informed the defendants of the loss on the 17th. At first the defendants thought that having regard to the terms of the telegram that the boat had got aground. On the 20th October, however, the plaintiff received a letter from Mohim informing him that the boat had been burnt, and this he communicated to the defendants who on 22nd October wrote to the plaintiff asking him to send the Manji to Messrs. Landale and Clark at Chandpur and the crew to Calcutta. This is a brief outline of the case made, or attempted to be made, by the plaintiff and his witnesses.

Turning then to the case set up by the defendants. In the first place it is to be noticed that the defendants in this case have raised a substantive case of an attempt by the plaintiff to defraud them.

Their case is that the plaintiff had on the 25th August shipped 425 drums of jute on board belonging to one Sharabut Ali, and that this boat on the 29th August sank near Faridpore. The jute of the plaintiff on board Sharabut's boat was uninsured. The defendants allege that the plaintiff owing to this loss was not in a good financial condition, and with a view to repair his losses he purchased for Rs. 60 an old and rotten boat. Then having effected the policy and having loaded this boat with some of the jute that was salvaged from Sharabut's boat and earth, together with a small quantity of jute in good condition, this old and rotten boat, with its composite cargo along with two tins of kerosine oil which had been placed on board was set fire to with intent to defraud the defendants by pretending that this old loaded boat as alleged was the boat and cargo mentioned in the policy.

Having gone through the whole of the evidence we think that there are elements of considerable suspicion connected with the plaintiff's case. The learned Judge, however, who tried the case and had the advantage of seeing and hearing the witnesses, has accepted the evidence of the plaintiff and his witnesses and has disbelieved the defendants' witnesses.

In these circumstances, we do not think there is sufficient ground to justify us in differing from the findings of fact of the learned Judge as to the sailing of the boat with the jute on board and its subsequent destruction by fire.

The case does not end there, however, as we have to consider whether there have been any breaches of the warranties appearing on the face of the policy. With regard to these points we cannot think that these matters were dealt with in a wholly satisfactory manner at the trial. The points appear to have been dealt with only incidentally during the course of the trial and do not appear to have been very directly argued. Consequently most of the points arising on the warranties have not been dealt with by the learned Judge in the course of his judgment.

Now, the term "warranty" as used in Policies of Marine Insurance is used to denote two different kinds of conditions—first, it is used to denote a condition to be performed by the assured, and, secondly, it is used to denote an exception from or limitation on the general words of the policy.

In the first case the warranties are conditions precedent to the policy—some of such conditions being precedent to the effectual making of the policy, others presuppose the contract made but are precedent to the accrual of a right to sue thereon, others declare the events in which all rights under the contract are forfeited, others deal with the mode of settling dispute, and others limit the period for bringing a claim. But in all cases whether the conditions be material to the risk or not, they must, unless waived, be fulfilled with the most scrupulous exactness, and if they be not so fulfilled there is a breach of an express stipulation which is one of the essential terms of the contract and the insurer is discharged from liability as from the date of the breach of warranty: see *Pawson v. Watson* (1) and *Arnould on Marine Insurance*, 7th edition, page 617.

Performance of a warranty in a Marine Policy is not a stipulation for the breach of which an action lies, but a condition

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precedent to the liability of the underwriter : Arnould, page 731. Coming then to the warranties on the face of the policy in suit, the first warranty it is material for us to notice is that contained in condition 2 (a), namely, that loss occasioned by cooking or smoking is excepted from the risk covered by the policy. It is impossible, however, to deal with this clause of exception independently of condition 8, which provides that no smoking or cooking shall be carried on in the said boat.

Now, the learned Judge has not by his judgment found what was the cause of the fire that destroyed the boat or whether or not smoking or cooking took place on board.

It has been urged before us on behalf of the plaintiff that the onus of proving that the cargo was destroyed by a fire caused by cooking or smoking lies on the insurers. This would appear to be so : *Boyd v. Dubois* (1) ; but this does not dispose of condition 8 which provides that no smoking or cooking shall be carried on in the said boat. Condition 8 is a condition precedent to the liability of the insurers under the policy ; and if smoking or cooking was carried on in the said boat it matters not whether the smoking or cooking caused the fire or not. It would appear that the plaintiff must prove that he has complied with all warranties as being conditions precedent to the policy attaching (Arnould, page 1452) or that the performance thereof has been effectually waived.

As we have already said, the learned Judge has made no findings at all with regard to the cause of the fire or whether or not smoking or cooking took place on board. When we come to examine the oral evidence given at the trial, we find there is a conflict of testimony on this point. There is, however, an important piece of documentary evidence on this point which we must consider. In the report made by Mohim, the *manji*, and the crew at the thanah on the 16th October, and when the facts must have been fresh in their memory within two days of the loss, we find that they stated that “at about midnight (*i.e.*, on the 14th October) somehow or other

the fire of the earthen pot having caught the jute in the boat burnt all the jute in the boat."

Now it seems to us from the wording of this report that there was fire in an earthen pot on board which set fire to the jute. This fire would be presumably used for the purpose of smoking or cooking. It is said, however, on behalf of the plaintiff that as the onus of proving a loss occasioned by cooking or smoking under condition 2 (a) of the policy is on the defendants this statement falls short of proving that the fire was occasioned by cooking or smoking. Even if that be so, the onus of proving compliance with condition 8 is on the plaintiff, and it matters not for the purpose of condition 8 whether or not the smoking or cooking caused the fire. In our opinion, having regard to the evidence adduced on behalf of the plaintiff that the loss was caused by the fire in an earthen pot on board which could be presumably only used for the purpose of cooking or smoking, we hold that the plaintiff has not shown that the provisions of condition 8 have been complied with.

We next come to condition 9 (a) which provides that in the event of loss the Manji or Charandar must report to the nearest police station within 24 hours and must state that the cargo is insured. Now it is not suggested on behalf of the plaintiff that this condition was complied with. The evidence on behalf of the plaintiff is that the fire occurred either in the late hours of the night of October 14th or before two o'clock in the morning of October 15th. Some witnesses say the former, some the latter, and that the report was not made to the police station until 8 A.M. on October 16th, and such report did not state that the cargo was insured. It is said on behalf of the plaintiff, and this view was accepted by the learned Judge, that as there might be no police station within 24 hours distance, or the Manji or Charandar or both of them might be drowned, the condition is one which might be impossible of fulfilment and therefore may be neglected. With the greatest respect to the learned Judge we are unable to agree in this view. The condition is one of the essential conditions on the footing of

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which the defendants contracted with the plaintiff; by inserting it the parties must be taken to have considered it of importance, and it is only on the fulfilment of this and other conditions that the liability of the defendants attaches. The fact that the condition may be impossible of fulfilment cannot affect this liability; if it were intended to do so qualifying words should have been introduced into the contract. On this point we may refer to the case of *Worsley v. Wood* (1), in which case it was stipulated "that the person assured should procure a certificate from the minister, churchwardens and some respectable house-holders of the parish not concerned in the loss importing that they were acquainted with the character and circumstances of the person insured, and knew or believed that he by misfortune and without any kind of fraud or evil practice had sustained by such fire the loss and damage therein mentioned." It was held that the procuring of such certificate was a condition precedent to the right of the assured to recover, and that it was immaterial that the minister, churchwardens, etc., wrongfully refused to sign the certificate. We may also refer to the case of *Law v. George Newnes* (2).

The next conditions we come to are conditions 9 (b) and (c). It is not suggested that these two conditions were performed. The plaintiff, however, says the performance of these two conditions was waived by the defendants.

On the 22nd October 1906, Messrs. Finlay, Muir and Company, the agents for the defendants, wrote to the plaintiff: "Please send the Manji to Messrs. Landale and Clark's Office at Chandpur, so that the full particulars of the accident may be furnished to them; please also arrange to bring down the crew." The Manji did proceed to Chandpur to Messrs. Landale and Clark and was examined by them; the crew, however, did not come to Calcutta. The learned Judge on these facts has found that the defendants waived the performance of conditions 9 (c) and (d). So far as there was any waiver it seems to us that there was only a waiver as to the Manji coming down to

(1) (1796) 6 T. R. 710.

(2) 31 Sc. L. R. 888.

Calcutta—the letter distinctly asks that the crew be brought down. In the view that we take on other points in the case, it becomes unnecessary for us to enter further into this point.

The last condition that we need refer to is condition 9 (f) which limits the right of suit on the policy to a term of six months next after the loss. This condition is of the utmost importance for if the argument on behalf of the defendants is well founded this suit was instituted after the period within which the parties expressly contracted that a suit must be brought. Now the fire on the boat occurred late on the night of the 14th October or the early morning of October 15th, 1906. This suit was not instituted until the 15th April 1907. It is therefore a matter of all importance to determine whether or not the word “month” as used in the condition means lunar month or calendar month. Now it is abundantly clear on the authorities in England that the word “month” in all contracts, except there is some evidence to show that “calendar month” is meant, means lunar month except in mercantile transactions in the City of London where “month” means “calendar month.” In support of this we need not do more than refer to the decision in *Simpson v. Margetson* (1), *Turner v. Barlow* (2) and *Bruner v. Moore* (3). The ordinary meaning of the word month in the English language is a lunar month and not the artificial month in the Gregorian calendar. This is sufficiently shown by the fact that until the year 1850 the word “month” in an Act of Parliament meant “lunar month,” since which date, however, by virtue of a statutory enactment the word “month” is used in Acts of Parliament to mean a calendar month. But the rule as to “month” meaning a “lunar month” in contracts still remains the law in England.

The learned counsel, however, for the plaintiff has argued before us that the rule is different in India having regard to certain Statutory Enactments of the Indian Legislature. The Statutory Enactments relied on are the General Clauses Act and section 25 of the Indian Limitation Act.

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The definition of the word "month," however, in the General Clauses Act is only for the purpose of Acts passed by the Indian Legislature. Then coming to section 25 of the Limitation Act, all that section provides is that for the purpose of that Act time shall be computed according to the Gregorian calendar. The object of the section is obvious; here in India there are in use several calendars, the Gregorian and the Bengali, Sambat, so forth—each of which divides the year artificially in a different manner, and for the purpose of the Limitation Act section 25 provides that the Gregorian calendar is to be used. This section therefore appears to us to have no bearing on the question what is the meaning of the word "month" in a contract drawn in the English language. In various statutes in India a month is defined as a calendar month; this would have been unnecessary if that were its ordinary meaning. As we have pointed out above it is clear in England that the word "month" in a contract means "lunar month," and we see no reason why the interpretation of an ordinary word in a contract in English should bear a different signification in India to that in England. But even if month in the policy mean calendar month, the plaintiff is apparently out of time. According to some of his witnesses the fire occurred before midnight of the 14th October. In his plaint he says the fire occurred on the 14th, the suit was not instituted until the 15th April, one day after the expiration of the six months.

We think, therefore, that for the reasons given above this suit is not maintainable by the plaintiff and that the judgment of the learned Judge was wrong and ought to be reversed. This appeal must therefore be allowed with costs both here and in the Court below.

HARINGTON J. This is an appeal by the defendants against a judgment of this Court in its original jurisdiction in favour of the plaintiff in an action on a policy of insurance on a cargo of jute.

The plaintiff alleges that the jute in question was loaded in a country boat bound from Ghiur to Calcutta: when near

Khager Chur the jute caught fire and the boat and cargo became a total loss.

When sued on the policy the defendants denied that the cargo was shipped, or that the boat was despatched from Ghiur. They denied that the boat referred to in the policy was destroyed by fire and alleged that the plaintiff had purchased an old boat of small value ; loaded it with some damaged jute ; and maliciously set it on fire so as to defraud the defendant Company. They further did not admit that the conditions of the policy had been complied with, and in particular charged certain specific breaches of specific conditions.

The learned Judge who heard the case came to the conclusion that the story told by the plaintiff was substantially correct, and that the story of the defendants as to the purchase of the old boat and as to the fraud perpetrated was entirely unworthy of belief.

We have heard the evidence dealt with, and I must confess that the plaintiff's case seems to me to be open to very grave suspicion. It is, however, needless to deal with the evidence, because though on paper there are many grounds for doubting its reliability, I do not feel sufficiently convinced of its falsity to justify me in differing on the facts from the learned Judge who both saw and heard the witnesses.

But the substantial grounds of appeal which the appellant has pressed arise on the non-compliance by the plaintiff with the conditions to be found on the face of the policy. The learned Judge in construing these conditions has held that a distinction must be drawn between the clauses which provide that on a breach of the condition the assured shall forfeit his rights under the policy, and the clauses which contain no such condition, and, that as some of the latter might become impossible of fulfilment, a compliance with them must not be taken as a condition precedent to the assured's right to recover. Further as to clause 9(b) he has held that there has been a waiver by the defendants.

The appellant argues that the plaintiff was bound to prove that he had complied with the warranties appearing on the

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face of the policy, and that not having done so his claim must fail. Further, that on the evidence adduced it has been proved that he did not comply with certain of these warranties, and in particular that on the face of the plaint it was shown that the action was brought too late.

He also contends that it lay on the plaintiff to prove that the loss was not due to a fire caused by cooking or smoking from which risk the policy was warranted free.

I do not agree with the last argument. The policy of insurance is a contract to indemnify the plaintiff against loss—*inter alia* against loss by fire—the plaintiff having proved the policy, his interest, and the loss is entitled to be indemnified if the defendant while admitting the loss desires to show that the fire which caused the loss was due to a particular risk which had been excepted from the risks he had undertaken to bear—then I think he was bound to aver that in his pleadings, and to prove it at the hearing. But this he has not done; there is no plea that the loss was due to cooking or smoking having been carried on in the boat, and therefore was not recoverable under clause 2 (a) of the warranties appearing on the policy. There has been a suggestion in the course of the argument that the Manji's report to the police, in which he states that the fire in an earthen pot communicated with the jute, establishes the fact that the fire was caused by smoking or cooking; but in my opinion the evidence does not go to that length. The witness should have been cross-examined on this point. The appellant's contention therefore that he is relieved from liability by clause 2 (a) must fail.

Next with regard to the warranties appearing on the face of the contract, those in clause 2 are exceptions from the risk which the defendants were willing to undertake—the others are conditions and in my opinion are conditions precedent to the assured's right to recover under the policy.

First, as a general rule conditions appearing on the face of the policy are conditions precedent, and secondly some of the conditions at any rate directly affect the risk to be undertaken by the insurers. For instance, clause 5 provides for the

appointment of a Charandar to take care of the cargo. Clause 6 the provision of money to enable assistance to be got in case of accident. Clause 8 provides that no smoking or cooking shall be carried on in the boat. If these conditions are not complied with the risk of loss is substantially increased. It was argued that clause 8 was unnecessary as long as the policy contained the exception in clause 2 (a), but I do not agree with the contention. The presence of fire for cooking or smoking would materially increase the risk of loss by fire; if the defendant could prove that the fire was caused by smoking or cooking, he would of course be absolved from liability under clause 2 (a), but it would remain that the fire risk was increased while the defendants could not escape liability without proving that the fire was caused by smoking or cooking, and that might be extremely difficult for them to do. There is authority for the proposition that any statement of fact or any promise material to the risk undertaken by the insurers is a condition precedent which must be strictly complied with; and where the performance of the conditions is traversed by the defendant, such performance must be proved by the plaintiff unless he relies on a waiver by the insurers of their right to insist on the fulfilment of the conditions: *Thomson v. Weems* (1), *Barnard v. Faber* (2).

I think therefore that the plaintiff was bound to prove a compliance with the warranties appearing on the face of the contract as a condition precedent to his right to recover.

He has not proved that he did comply with the conditions. On the contrary it has been proved that no report was made at the nearest police station within 24 hours as provided by clause 9 (a) of the conditions nor when the report was made, was there any statement that the cargo was insured. Lastly the appellant contends that the action was not brought within six months after the loss—the plaintiff therefore is debarred from recovering under clause 9 (f) of the policy.

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On the face of the pleadings the plaintiff is clearly barred for his plaint is dated April 15th, and in it he alleges the loss occurred on October 14th and that his cause of action accrued on that day.

If that statement be true then his time for bringing the action must expire on April 14th, and indeed the plaintiff only becomes entitled to that delay if month be construed as "calendar month," and if notwithstanding the very express words of the policy "that the action shall be commenced within the term of six months next after any loss or damage shall occur, and if any such suit or action shall be commenced after the expiration of six months next after such loss or damage shall have occurred, the lapse of time shall be taken as conclusive evidence against the validity of the claim," the English rule of construction be adopted, and the day of the occurrence excluded from the period: *Radcliffe v. Bartholomew* (1).

But the appellant contends that even adopting the English rule of construction and excluding the day of the occurrence the plaintiff is out of time, because "month" means "lunar" and not an English calendar month.

In England there is a dictum at *Nisi Prius* in the case of *Hart v. Middleton* (2) to the effect that in mercantile transactions "month" means calendar, and not lunar month, but that dictum is directly at variance with the case of *Bruner v. Moore* (3), which lays down that month means lunar month, though the presumption that month means lunar month can be displaced by evidence to show that in any particular instance it was intended by the parties to mean calendar month or that there was a custom or a statute under which month meant in the particular case calendar month. That the latter case, which is a carefully considered judgment and not the dictum in *Hart v. Middleton* (2), expresses what is really the law is shown by legislation for in the Sale of goods Act 56 and 57 Vict. c. 71, section 10 (2), it is enacted that in a contract of sale "month" means *prima facie* "calendar month." This

(1) [1892] 1 Q. B. 161.

(2) (1845) 2 C. & K. 9.

(3) [1904] 1 Ch. 305.

provision would have been quite unnecessary had the dictum in *Hart v. Middleton* (1) been a correct statement of the law.

Is the law as laid down in *Bruner v. Moore* (2) applicable here? To begin with a reason exists for interpreting "month" in this country to mean lunar month which does not exist in England. Here a month if a lunar month would express the same period of time to all the peoples who dwell in India, while if construed as a calendar month it would not, but would vary with the different calendars used, *i.e.*, whether English, Bengali, Sambat, etc. If therefore "month" were construed calendar month, then another question would have to be determined, and that would be by what calendar the month was to be measured, and in all cases where the contracting parties were accustomed to use different calendars, as for example in a contract between an Englishman and a Bengali, it would be necessary to prove by evidence which calendar the parties intended their month to be measured by.

But I think the course of legislation shows that the word "month" in India as in England means *primâ facie* lunar month. In the Penal Code it is enacted that where the word month is used, it is to be understood that the month is to be reckoned according to the British calendar, and a similar provision is to be found in the Succession Act and General Clauses Act. I can find nothing in the Contract Act defining the meaning of "month" in a contract. Inasmuch as in the Acts to which I have referred "month" has a statutory meaning, I infer that it would not have had that meaning but for the statutes.

As there is no Act giving this statutory meaning to the word month in a contract to indemnify, I take it that in such a contract month bears the same meaning that it would *primâ facie* bear under English Law and would mean a lunar month.

For this reason, whether the loss occurred on the 14th October as alleged in the pleadings and in the report made to the police or at 2 A.M. on the 15th as stated by some of the

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witnesses, I think that the plaintiff's suit is barred by clause 9 (f) of the conditions appearing on the face of the policy. It has been argued that the defendants were bound to have averred the breach of this condition in their written statement, I do not think so because it was apparent on the face of the plaint for the plaintiff embodied in his plaint the policy and dated his plaint so as to show that it was filed more than six months after the date of the loss.

In my opinion, therefore, the plaintiff's suit must fail because it has been shown that he did not comply with clause 9 (a) and it has not been shown that he did comply with clauses 6 and 8 of the conditions on which the defendants were willing to indemnify him against loss, and secondly on the ground that his action is not brought within the time limited by clause 9 (f) of the conditions on the policy. I agree, therefore, that the appeal must be allowed.

FLETCHER J. The judgment delivered by the learned Chief Justice represents my judgment in the matter, and I therefore agree.

Appeal allowed.

Attorneys for the appellant Company : *Morgan & Co.*
Attorneys for the respondent : *B. N. Basu & Co.*

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

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Limitation Act (XV of 1877), Sch. II, Art. 180—"Revivor of judgment," meaning and effect of—Scire facias, analysis of—Legislature, its power to alter laws and correct errors of Courts and significance of its silence—Civil Procedure Code (XIV of 1882), ss. 230, 234—Formal application for substitution of deceased decree-holder, not absolutely necessary—Two Codes, not to be so construed as to be conflicting—Civil Procedure Code (V of 1908), s. 48.

When the legislature used the term "revivor of judgment" in the Limitation Acts of 1871 and 1877, they had in view the procedure embodied in s. 216 of the Code of Civil Procedure of 1859 and s. 248 of the Code of 1877 and also the proceedings to revive then current in the Supreme Court, which were closely analogous to the (English) Common Law Procedure Act of 1852.

Scire facias analyzed and its history traced.

There is the same provision for revivor of judgments under the present law as there was under the old Statutes of Limitation.

Tincowrie Dawn v. Debendro Nath Mookerjee (1) dissented from.

Ashootosh Dutt v. Doorga Churn Chatterjee (2) followed.

Monohar Das v. Futteh Chand (3) explained and distinguished.

The balance of authority preponderates largely in favour of the view that the Statute of Limitation to which a judgment is subject ceases to run upon a revivor of the judgment, where the matter is not governed by Statute.

The English case-law on the point dealt with.

It is a well-settled principle of construction that the Legislature is presumed to know not only the general principles of law but the construction which the Courts have put upon particular Statutes.

English and American leading cases cited.

The principle of construction above enunciated is based on the ground that, as Legislature knows what the law is and has the power to alter it, any mistake on the part of the Judges may at once be corrected, and the absence

*Appeals from Original Orders, Nos. 447 and 480 of 1907, against the order of Paresb Nath Chatterjee, Subordinate Judge of Hooghly, dated July 1, 1907.

(1) (1890) I. L. R. 17 Calc. 491.

(2) (1880) I. L. R. 6 Calc. 504.

(3) (1903) I. L. R. 30 Calc. 979.

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of any such correction, specially during a long period of time, indicates that the Courts have rightly ascertained the intention of the Legislature.

Phelan v. Johnson (1) followed.

Section 230 of the Code of Civil Procedure, 1882, ought not to be so construed as to make it conflict with the provisions of Art. 180 of the Limitation Act of 1877.

Mayabhai Prembhai v. Tribhuvandas Jagjivandas (2), *Ganapathi v. Balasundara* (3) and *Futteh Narain Chowdhry v. Chundrabati Chowdhraim* (4) followed.

Code of Civil Procedure of 1908, s. 48, noticed in this connection.

It is not necessary for the remaining decree-holders to make a formal application for substitution of a deceased decree-holder. Section 234 of the Code merely requires that the legal representative should apply for execution of the decree and that his name should be brought on the record.

Syud Nadir Hossein v. Baboo Pearoo Thorildarinee (5) and *Balkishoon v. Mahommed Tamaz Allee* (6) referred to.

APPEAL by Jogendra Chandra Roy, the judgment-debtor.

Balkissen Das, Shyam Das and Mathura Das obtained a decree against Jogendra Chandra Roy, in the Calcutta High Court on the 16th December 1891, and in execution realised only a small portion of the decretal amount. On the 30th January 1897, a second application for execution was made, praying for attachment of decree No. 642 of 1893 in favour of Jogendra Chandra Roy, the judgment-debtor. The application proved useless owing to the subsequent final discharge of Ramsadoy Barat, the judgment-debtor in suit No. 642 of 1893. There was a third application for execution on the 1st January 1903 by Shyam Das and Mathura Das, for themselves and as the heirs and legal representatives by survivorship of the deceased Balkissen Das. The decree was then sent under section 223, Civil Procedure Code, to the Court of the Subordinate Judge of Hooghly for execution by that Court. On the 17th August 1906, Shyam Das and Mathura Das applied for execution of the decree in the second Court of the Subordinate Judge of Hooghly. The judgment-debtor objected on the grounds that the substitution should have been made *formally* and in the High Court, where the decree was passed,

(1) (1844) 7 Ir. L. R. 535.

(2) (1881) I. L. R. 6 Bom. 258.

(3) (1884) I. L. R. 7 Mad. 540.

(4) (1892) I. L. R. 20 Calc. 551.

(5) (1873) 19 W. R. 255.

(6) (1872) 4 All. H. C. 90.

that execution was barred by limitation and that the present decree-holders, having previously attached a decree obtained by the judgment-debtor against one Ramsadoy Barat and the said judgment-debtor thereby being prevented from realizing his dues under the attached decree and having suffered loss in consequence, the present decree for execution should be treated as satisfied. The Subordinate Judge disallowed the objections. The judgment-debtor thereupon appealed to the High Court.

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Babu Jadunath Kanjilal, for the appellant. The application for execution is barred by limitation under Article 180 of the Limitation Act. Under the present law, there is absolutely no provision for revivor of judgment, decree or order. Even if there is, in this case, there has been no revivor. I rely on *Tincowrie Dawn v. Debendro Nath Mookerjee* (1).

[MOOKERJEE J. What do you say as to *Ashutosh Dutt v. Doorga Churn Chatterjee* (2), *Futteh Narain Chowdhry v. Chundrabati Chowdhraim* (3), *Suja Hossein v. Monohur Das* (4) and the cases in the other High Courts: *Ganapathi v. Bala-sundara* (5), *Umrao Singh v. Lachmi Narain* (6) and *Beni Madho v. Shiva Narain* (7)?]

After the decision in *Tincowrie Dawn v. Debendro Nath* (1) we must regard the earlier decisions erroneous. The still recent case of *Monohar Das v. Futteh Chand* (8) is in my favour: see also *Suja Hossein v. Monohur Das* (9). There should be a reference to the Full Bench if the cases I have cited are not followed.

Lastly, substitution on the death of a judgment-creditor should have been applied for in the Original Side of the High Court. No other Court had the authority to proceed with the execution at the instance of the remaining decree-holders.

(1) (1890) I. L. R. 17 Calc. 491.

(2) (1880) I. L. R. 6 Calc. 504.

(3) (1892) I. L. R. 20 Calc. 551.

(4) (1896) I. L. R. 24 Calc. 244.

(5) (1884) I. L. R. 7 Mad. 540.

(6) (1904) I. L. R. 26 All. 361.

(7) (1907) 4 All. L. J. 405.

(8) (1903) I. L. R. 30 Calc. 979.

(9) (1895) I. L. R. 22 Calc. 921.

[MOOKERJEE J. Is actual substitution of the name of the legal representative, by *formal* application, absolutely necessary for the validity of execution proceedings ?]

Babu Baidyanath Dutt (Babu Tarinidas Banerjee with him), for the respondents, were not called upon.

Cur. adv. vult.

MOOKERJEE AND CARNDUFF JJ. This is an appeal on behalf of the judgment-debtor against an order for execution of a decree obtained by the respondents decree-holders against him on the 16th December 1891 on the Original Side of this Court. The decree was originally in favour of Balkissen Das, Shyam Das, and Mathura Das and was for a sum of Rs. 11,044 with interest. On the 2nd January 1892, execution proceedings were instituted, in the course of which a sum of Rs. 824 was realised. On the 30th January 1897, a second application for execution was made and the decree-holder applied for attachment of the interest of the judgment-debtor in a decree passed in another suit. Notice was served on the judgment-debtor and an order for attachment was made. The judgment-debtor under that decree, however, was an insolvent and obtained his final discharge ; no further proceedings were, therefore, taken by the respondents on their application for execution. Subsequently Balkissen Das, one of the decree-holders, died, and on the 1st January 1903, the remaining decree-holders, one of whom had by survivorship acquired the interest of the deceased decree-holder applied to the Original Side of this Court for transfer of the decree to the Court of the District Judge of Hooghly, within the jurisdiction of which Court, it was alleged, the judgment-debtor resided and possessed properties. Notice was issued under section 248, Civil Procedure Code of 1882, upon the judgment-debtor on the 31st January 1903 and as no cause was shown on his behalf, an order was made on the 10th August 1906 for the issue of the necessary certificate. The decree was then transmitted to the Court of the Subordinate Judge, and on the 17th August 1906 the decree-holders presented in his Court the

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usual application for execution. Notice was issued upon the judgment-debtor who appeared on the 8th December 1906 and objected to the execution substantially on the ground that the decree under execution was barred by limitation and also alleged that the property sought to be attached belonged to a religious endowment and was not liable to be sold in execution. The Subordinate Judge overruled these objections and ordered execution to proceed. The judgment-debtor has now appealed to this Court and on his behalf the decision of the Subordinate Judge has been challenged on four grounds, namely, *first*, that as the judgment-debtor has been declared an insolvent and all his properties have been vested in the Official Assignee, execution cannot proceed; *secondly*, that the application for execution is barred by limitation under Article 180 of the second schedule of the Limitation Act of 1877; *thirdly*, that as one of the decree-holders had died, the other decree-holders could not proceed with execution till they had made an application for substitution, which if made could be entertained only by the High Court, and *fourthly*, that as the decree-holders had in the second execution proceedings obtained an order for attachment of a decree in which the judgment-debtor was the decree-holder and as by reason of their default the interest of the judgment-debtor in that decree had been extinguished, the decree-holders should not be allowed to proceed with the present execution. We shall consider these objections in the order in which we have stated them.

In support of his first ground, the learned vakil for the appellant has invited our attention to an order made by this Court in its Insolvency jurisdiction on the 9th April 1878 by which the appellant Jogendra Chandra Roy was declared an insolvent and his assets were vested in the Official Assignee. There are no materials, however, on the record to show what has happened since 1878. Nor is there anything to show that the appellant has obtained his final discharge. This particular ground was not urged in the Court below, and all we need observe, is that upon the materials on the present record, the appellant has not satisfied us that he is entitled to protection

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from execution under the decree obtained by the respondents. The first objection taken on behalf of the appellant must consequently be overruled.

The second ground urged on behalf of the appellant is that the application for execution is barred by limitation under Article 180 of the Limitation Act of 1877. That Article provides that an application to enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction must be made within 12 years from the date when a present right to enforce the judgment, decree or order accrues to some person capable of releasing the right, provided that (we quote so much only of the section as has any application to the case before us) when the judgment, decree or order has been revived, the twelve years shall be computed from the date of such revivor. The learned vakil for the appellant argued that there is no provision under the present law for the revivor of a judgment, decree or order, and that in any event, there has not been in the present case such a revivor as is contemplated by the Limitation Act. He candidly conceded, however, that his contention was opposed to a series of decisions of this Court, namely, the cases of *Ashutosh Dutt v. Doorga Churn Chatterjee* (1), *Futteh Narain Chowdhry v. Chundrabati Chowdhra* (2), *Suja Hossein v. Monohur Das* (3). It was also not disputed by him on behalf of the appellant that the rule laid down in these cases had been accepted as good law by the Madras High Court in *Ganapathi v. Balasundara* (4) and by the Allahabad High Court in *Umrao Singh v. Lachmi Narain* (5) and in *Beni Madho v. Shiva Narain* (6). The learned vakil for the appellant, however, strenuously contended upon the authority of the observations of Mr. Justice Wilson in the case of *Tincovrie Dawn v. Debendro Nath Mookerjee* (7) that those decisions were erroneous; and he also placed reliance, to some extent, upon the

(1) (1880) I. L. R. 6 Calc. 504.

(4) (1884) I. L. R. 7 Mad. 540.

(2) (1892) I. L. R. 20 Calc. 551.

(5) (1904) I. L. R. 26 All. 361

(3) (1896) I. L. R. 24 Calc. 244.

(6) (1907) 4 All. L. J. 405.

(7) (1890) I. L. R. 17 Calc. 401

cases of *Monohar Das v. Futteh Chand* (1) and *Suja Hossein v. Monohur Das* (2) which latter, however, was subsequently set aside on review, the judgment on rehearing *Suja v. Monohur* (3) negating the contention of the present appellant. In this state of the authorities, the learned vakil for the appellant invited us to consider the matter upon principle in view of a possible reference to a Full Bench.

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Article 180, to the terms of which we have already referred, provides that the period of 12 years is to be computed from the date of revivor of the judgment, decree or order sought to be enforced. The term revivor is nowhere defined in the Limitation Act, nor is any definition of the term given either in the General Clauses Act or in the Code of Civil Procedure. As pointed out, however, by Mr. Justice White in *Ashutosh Dutt v. Doorga Churn Chatterjee* (4) the provisions of Art. 180 are a reproduction of those of Art. 169 of the Limitation Act of 1871, which again were based upon section 19 of the Limitation Act of 1859. At the time when the Limitation Act of 1859 was passed, there was a procedure for revivor of judgment on the Original Side of this Court. The 195th of the Rules of 1851 on the Plea Side of the Supreme Court recognized the principle that execution could not issue upon judgments more than a year old without issuing out a writ of *scire facias* against the defendant; and a reference to the Plea Rules of 1837 (Rules and Orders of the Supreme Court by Smoulton and Ryan, 1839, Vol. II, page 93) shows that the rule in question had been in force for many years and had been introduced into the Chartered High Courts from the English law which governed its operation and effects. There can be no question, therefore, that when the Limitation Act of 1859 was passed by the Legislature, proceedings for revivor of judgment were matters of common occurrence and the Legislature had undoubtedly this procedure in view when they laid down in section 19 of Act XIV of 1859 that the period of twelve years was to run from the date of revivor.

(1) (1903) I. L. R. 30 Calc. 979.

(3) (1896) I. L. R. 24 Calc. 244.

(2) (1895) I. L. R. 22 Calc. 921.

(4) (1880) I. L. R. 6 Calc. 504.

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When, however, the Limitation Acts of 1871 and 1877 were passed, although the term "revivor" was reproduced, the writ of *scire facias* had become obsolete and its place had been taken by the procedure contained in sections 215 and 216 of Act VIII of 1859 which were replaced by sections 245 and 248 of the Codes of 1877 and 1882. The question therefore arises, what operation had the Legislature in view in 1871 and 1877 when they spoke of revivor of judgment in the Limitation Act. It would be unreasonable to assume that the Legislature contemplated a contingency which could no longer possibly arise. It is consequently necessary to examine for a moment the true nature of the process of revivor of judgment by the writ of *scire facias* and to determine whether there is anything in the present law which substantially corresponds to that process. Now, it is a matter of common learning that *scire facias* was "a writ founded on some matter of record, as recognizance or judgment, on which it lies to obtain execution or for other purposes as to repeal Letters Patent, hear-errors, etc. In general, it was a judicial writ issuing out of a Court where the record was, because the defendant might plead thereto ; it was considered in law an action ; therefore a release of all actions was a good bar to *scire facias*": Tidds' Practice, 1828, Chap. 43, page 1090. In other words, a *scire facias* was a judicial writ issued for the purpose of substantiating and carrying into effect an antecedent judgment. As pointed out in Freeman on Judgments, Vol. II, section 442, before a judgment was either satisfied by payment or barred by lapse of time, it might become temporarily inoperative so far as the right to issue execution was concerned, and so continue until something was done by which such right was revived ; in this condition it was usually called a dormant judgment. This dormancy in judgments was at common law usually created either by a change in the parties, plaintiff or defendant, or by the lapse of time without the issuing of execution. There were also cases in which execution was to be issued in certain contingencies only, and in which it became necessary to establish the existence of the contingency before the writ could be regularly issued out

So the judgment might have been satisfied through fraud or mistake or by execution upon property not belonging to the defendant, and it might, therefore, be necessary to set aside the satisfaction and to obtain leave to issue further execution. When from any cause it became necessary to apply to a Court for a revivor of the right to issue execution, the remedy of the plaintiff was by a *scire facias*. As was very clearly put in *Brown v. Harley* (1) "a *scire facias* to revive a judgment is not an original but a judicial writ founded on some matter of record, to enforce execution of it; and properly speaking, is only the continuation of an action, a step leading to the execution of a judgment already obtained and enforcing the original demand for which the action was brought. It creates nothing anew but may be said to reanimate that which before had existence but whose vital powers and faculties are, as it were, suspended and without its statutory influence, would be lost." The objects of a *scire facias* therefore were: (i) to revive an ordinary judgment between the parties thereto, (ii) to obtain execution where a new party is to be charged or benefited, (iii) to obtain execution on a contingent judgment upon the happening of the contingency. As between the original parties, a *scire facias* became necessary, (i) where by the fault of the plaintiff no execution had issued out within a year and a day after the entry of the judgment, (ii) where at any time the judgment seemed to be satisfied when in fact it remained wholly or partly unpaid. The cases in which it became necessary to prosecute a *scire facias* to obtain the benefit of an execution for or against a new party, arose when a change of parties occurred through the death, marriage or bankruptcy of one of the parties: see Freeman on Executions, Vol. I, Secs. 27, 28, 53, 54, 83, 84 and 85. The writ was next served, and upon return made, if any one appeared in response to the writ, he would be heard. It is unnecessary to consider what might be pleaded by the defendant either in bar or in abatement, but it may be generally stated that no ground of defence anterior to the old judgment sought to be enforced could be brought

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forward, just as no cause of action beyond the old judgment could be asserted and no relief beyond what was embraced therein obtained. Finally, the judgment entered upon the *scire facias* would be simply that the plaintiff will have execution for the judgment mentioned in the said *scire facias* and costs : Freeman on Executions, Vol. I, section 92 (a). The substance of the matter, so far as we are concerned, may therefore be thus stated : a *scire facias* is a judicial writ founded on some matter of record and having for its object the prevention of undue surprise by interposing itself as a warning between judgment and execution wherever a new party is to be charged or benefited by such execution, whenever such execution is contingent, after judgment, on the existence of certain circumstances to be first proved by the party charging ; and lastly, whenever execution has been delayed beyond the specified period (a year and a day under the common law) after the judgment was signed, that delay not arising from the party charged : Bingham on Judgments and Execution, page 122 ; Freeman on Execution, Vol. I, section 81.

If now we bear in mind the essential features of a writ of *scire facias* and of the result to be gained by a recourse to it, it is by no means difficult to identify it substantially with the procedure embodied in section 248 of the Code of Civil Procedure. The object of this procedure as also of the procedure embodied in the corresponding section 216 of the Code of 1859, was to give notice, so as to prevent undue surprise to a judgment-debtor when more than one year had elapsed between the date of the decree and the application for execution or when the decree was sought to be enforced against the legal representative of the party against whom the decree was originally made. It seems to us to be fairly obvious, therefore, that when the Legislature used the term "revivor of judgment" in the Limitation Acts of 1871 and 1877, they had in view the procedure embodied in sections 216 of the Code of 1859 and 248 of the Code of 1877.

We are further fortified in this view by an examination of the provisions of the Common Law Procedure Act of 1852,

sections 128 to 134, which fully define the nature of the proceedings for revivor of judgment, and there can be no reasonable doubt that when the framers of the Limitation Act of 1859 used the term "revivor of judgment" they must have had in view the proceedings to revive, then current in the Supreme Court, which were closely analogous to the proceedings to revive under the Common Law Procedure Act of 1852: Chitty's Archbold's Practice, 1866, Vol. II, page 1122.

It may be pointed out that there has been some diversity of judicial opinion upon the question whether a revivor of judgment prolongs the life of the original judgment for the purposes of limitation [Freeman on Executions, Vol. I, section 93 (a)]; but the balance of authority, where the matter is not governed by statute, preponderates largely in favour of the view that the Statute of Limitations to which the judgment is subject ceases to run upon such revivor, although the reasons for this conclusion have not been unanimous. As briefly indicated in the judgment of Mr. Justice White in *Ashutosh Dutt v. Doorga Churn Chatterjee* (1) the question had been raised in the Irish Courts and decided by the House of Lords as well as by the Judicial Committee of the Privy Council in favour of the view that time should run afresh from the date of the revivor. In fact almost from the very first the opinion of the Judges has tended in this direction: see *Crofts v. Hughson* (2), *Kealey v. Bodkin* (3), *Finch v. Fitzgibbon* (4), *Ottiwell v. Dunbar* (5), *Ottiwell v. Farran* (6), *Ryan v. Camby* (7); though authorities are not wanting the other way: see *Bolton v. Armstrong* (8). The point directly arose in the case of *Ottiwell v. Farran* (9). But when the case was taken to the House of Lords on appeal from the Exchequer Chamber in Ireland [*Farran v. Beresford* (10)] the point was left undecided, although Tindal C. J. in delivering the opinion of the Judges, intimated that whatever might be the case if the revivor was

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(1) (1880) I. L. R. 6 Calc. 504.

(2) (1837) 2 Jones 499.

(3) (1837) Sausse. and Scully 211.

(4) (1838) 6 Ir. L. R. N. S. 312.

(5) (1837) 6 Ir. L. Rec. N. S. 10.

(6) (1837) Sau. and Sc. 218.

(7) (1840) 2 Ir. Eq. Rep. 328.

(8) (1836) 5 Ir. L. Rec. N. S. 37.

(9) (1839) 2 Ir. L. Rep. 110.

(10) (1842) 10 Cl. & F. 318.

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between the same parties and was only necessary because the time for execution had elapsed, a new present right to receive was given by the judgment in *scire facias* when that right was necessary in consequence of the death of the parties. This doctrine was approved by Lord Lyndhurst in *Farrel v. Gleeson* (1) and may be taken as settled as regards a revivor against the representatives of a deceased party to the existing judgment. This case before the House of Lords, however, left open the effect of a revivor as between the original parties. The question was directly raised in *Griffin v. Blake* (2) and it was held by Smith M. R. that time should begin to run afresh from such revivor, as well as from a revivor where there was a change of parties. This decision was approved by the Judicial Committee of the Privy Council in *In re Blake* (3). This view is also supported by the high authority of Lord St. Leonards (Real Property Statutes, 123) and Mr. Prideaux (Judgments 57). We are not unmindful however that even in Ireland a question has been raised as to effect of the procedure substituted for the writ of revivor by the Rules of the Supreme Court (Ir.) 1891 Ord. XLII, Rules 24-25, which correspond with the English Rules of the Supreme Court 1883, Ord. XLII, Rules 22 and 23. With reference to this procedure, which corresponds with what is laid down in section 248 of the Code of Civil Procedure of 1882, Mr. Justice O'Brien raised the question in *Evans v. O'Donnell* (4) whether an order for leave to issue execution under the Judicature Act would have the effect that was ascribed to a revivor by the House of Lords in *Farran v. Beresford* (5). But no reasons were assigned by the learned Judge in support of his opinion that the force of the Judicature Act would be held to deprive such an order of all efficacy as a means of making time run afresh. We are however here free from any such possible difficulty. We are called upon to construe Art. 180 of the second schedule of the Limitation Act and to determine the meaning and scope of the term revivor of

(1) (1844) 11 Cl. and F. 702.

(3) (1853) 2 Ir. Ch. Rep. 643.

(2) (1848) 2 Ir. Ch. Rep. 645.

(4) (1885) 16 L. R. Ir. 445, 452.

(5) (1842) 10 Cl. & F. 319.

judgment used therein. When we look to the history of the legislation on the subject, we find it difficult to resist the conclusion that the Legislature must have intended by "revivor of judgment" the procedure prescribed in section 248 of the Code of Civil Procedure of 1882. With all deference to the opinion of Mr. Justice Wilson in *Tincourie Dawn v. Debendro Nath Mookerjee* (1), an opinion which is no doubt entitled to great weight, we are consequently not prepared to share the doubt expressed by that learned Judge. We observe that no reasons are stated in support of the doubt expressed, and the learned vakil for the appellant has not been able to assign any substantial reason in support of that view. An analysis of the nature of the writ of *scire facias* or of the writ of revivor shows conclusively that a proceeding under section 248 of the Code of Civil Procedure of 1882 is in its essence and result identical for our present purposes with the former. We must, therefore, uphold the view taken in the case of *Ashutosh Dutt v. Doorga Churn Chatterjee* (2) as well founded, and we are not prepared to dissent from the series of decisions in which that view has been approved and followed. It may be added that there are other weighty reasons in support of the view taken by us. The case of *Ashutosh Dutt v. Doorga Charan Chatterjee* (2) was decided so far back as 1880, shortly after the Limitation Act of 1877 had come into operation. Since then, and in spite of the doubt expressed by Mr. Justice Wilson, the Legislature has not intervened. On the other hand, we find from the new Limitation Act (IX of 1908) which consolidates and amends the law on the subject, that the provisions of Article 180 are reproduced as Article 183 without any alteration. The inference seems irresistible that the judicial interpretation of Article 180 to which we have referred, correctly represented the intention of the Legislature. It is a well settled principle of construction that the Legislature is presumed to know not only the general principles of law but the construction which the Courts have put upon particular statutes. In the words of Lord Campbell C. J. in *Mansell v.*

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Queen(1) and Lord Justice James in *Ex parte Campbell* (2) "where a section of an Act which has received a judicial construction is re-enacted in the same words, such re-enactment must be treated as a legislative recognition of that construction": see also *Dale's case* (3), *Greaves v. Tofield* (4), *Clark v. Wallond* (5), *Jay v. Johnstone* (6). The inference is therefore perfectly legitimate that the Legislature has in the new Act adopted the settled judicial construction which is thereby sanctioned and intended to be continued in force: see *Re Abbotsford* (7). But even independently of the provisions of the Act of 1908, the same inference would follow from another circumstance; an express recognition of the construction which the Judges have put upon statutes is not always needed, in some cases the silence of the Legislature is equally emphatic. This principle of construction is based on the ground that, as the Legislature knows what the law is and has the power to alter it, any mistake on the part of the Judges may at once be corrected, and the absence of any such correction, specially during a long period of time, indicates that the Courts have rightly ascertained the intention of the Legislature. We need only refer to the observation of Baron Lefroy in *Phelan v. Johnson* (8): "I recollect Lord Redesdale saying that when the Court has been in the habit of putting a particular construction upon an Act of Parliament and the Legislature has not interfered, it must be considered as the true construction of the Act." On all these grounds we must hold that the order made in the second execution proceeding on the 6th May 1897 had the effect of reviving the original decree and consequently the present application which has been made within 12 years of that date, is not barred under Article 180 of the second schedule of the Limitation Act. This view is in no way opposed to the decision of this Court in the case of *Monohar Das v. Futteh Chand* (9) in which it was held that as a general rule, if there has been no order for execution, the mere

(1) (1857) 8 E. & B. 54, 73.

(2) (1870) L. R. 5 Ch. App. 703.

(3) (1881) 6 Q. B. D. 376 at p. 453.

(4) (1880) 14 Ch. D. 563, 571.

(5) (1883) 52 L. J. Q. B. 321.

(6) [1893] 1. Q. B. 25, 189.

(7) (1879) 98 U. S. 440.

(8) (1844) 7 Ir. L. R. 535.

fact that an application has been made for execution of a decree and notices have been issued under sections 232 and 248 of the Code, does not operate as revivor within the meaning of Article 180. In the case before us, there was an order for execution, and the decision relied upon is on this ground obviously distinguishable.

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It may be contended, however, that the application is barred under section 230, Code of Civil Procedure, which provides that where an application to execute a decree for payment of money has been made under that section and granted, no subsequent application to execute the same decree shall be granted after the expiration of 12 years from the date of the decree sought to be enforced. In the present case, as already stated, the decree was made on the 16th December 1891 and an order for execution under section 230 was made in the first execution proceeding of 1892 as also in the second execution proceeding of 1897. It may therefore be argued with some plausibility that, if Article 180 saves the execution from limitation, section 230 presents an effective bar. There is no substance, however, in this objection, for as was pointed out in the cases of *Mayabhai Prembhai v. Tribhuvandas Jagjivandas* (1) *Ganapathi v. Balasundara* (2) and *Fatteh Narain Chowdhry v. Chundrabati Chowdhraim* (3), section 230 ought not to be so construed as to make it conflict with the provisions of Article 180 of the Limitation Act. What was ruled in these cases was that the provisions of the two Acts ought not to be so interpreted as to contradict each other, and that, therefore, section 230 cannot be taken to limit Article 180. It is worthy of notice that this interpretation has subsequently received the sanction of the Legislature, and in the Code of Civil Procedure of 1908, section 48, which replaces the 3rd and 4th paragraphs of section 230 of the Code of 1882, expressly provides that nothing in that section shall be deemed to limit or otherwise affect the operation of Article 180 of the second schedule of the Indian Limitation Act. Statutory authority has, therefore, been given to the

(1) (1881) I. L. R. 6 Bom. 258.

(2) (1884) I. L. R. 7 Mad. 540.

(3) (1892) I. L. R. 20 Calc. 551.

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rulings which declared Article 180 of the Limitation Act to be independent of section 230 of the Code of Civil Procedure of 1882, and, upon the principles of construction which we have already explained, the inference is irresistible that these decisions accurately interpreted the intention of the Legislature. It follows consequently that the second ground taken on behalf of the appellant must be overruled from every possible point of view.

The third ground taken on behalf of the appellant raises a purely technical objection of an entirely unsubstantial character. It is argued that upon the death of one of the judgment-creditors Balkissen, an application for substitution ought to have been made to the Original Side of this Court which passed the decree, and that, in the absence of an order from this Court, the District Court to which the decree had been transferred for execution had no authority to proceed with the execution at the instance of the other judgment-creditors, one of whom had obtained by survivorship the interest of the deceased creditor. An examination of the provisions of the Code makes it obvious that there is no foundation for this contention. The Civil Procedure Code does not expressly provide for an application for substitution under circumstances like these. There is no provision which renders necessary the actual substitution of the name of the legal representative for the validity of the proceedings in execution. Section 232 merely requires that the legal representative should apply for execution of the decree, and that his name should be brought on the record: *Syud Nadir Hossein v. Baboo Pearoo Thovildarinee* (1), *Balkishoon v. Mahomed Tamaz Allee* (2). This provision was substantially complied with in the case before us. The surviving decree-holders in their application to this Court for transfer of the decree stated that the creditor Balkissen Das was dead and that Sham Das, one of the other execution-creditors, was his legal representative. The application further contained a prayer that Shyam Das and Mathura Das, the two surviving execution-creditors, might be allowed to obtain a transfer of the decree to the Court of the

District Judge of Hooghly for execution. Upon notice to the judgment-debtor and without any objection, the order for transfer was made. In our opinion it was not necessary for the decree-holders to make a formal application for substitution in the Court of the District Judge as they did ; they were quite competent to carry on the execution without any such application. The third objection, therefore, cannot be supported and must be overruled.

The fourth ground taken on behalf of the appellant raises a question of estoppel. It is contended that by reason of the negligence of the present respondents, who had attached a decree in which the judgment-debtor was the decree-holder, his rights under the decree have been extinguished by limitation, and therefore the respondents are not entitled to proceed with execution till at any rate they have indemnified the appellant for the damage which he had sustained. No such objection, however, was taken in the Court below and there are no materials upon the record upon which this question can be determined. Apart, therefore, from the question, whether an objection of this character is maintainable in execution proceedings, we must decline to entertain it on the ground that it had not been taken at an earlier stage of the proceedings. The fourth ground of objection also must therefore be overruled.

The result is that none of the grounds upon which the decision of the Subordinate Judge is challenged can be maintained. The appeals, therefore, fail and must be dismissed with costs.

Appeals dismissed.

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CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Ryves.

1909
Jan. 21.

SALT
v.
EMPEROR.*

Witness—Statement of witness taken by the police during the investigation and recorded in the Special Diary—Copies of such statements when to be given to the accused—Criminal Procedure Code (Act V of 1898), ss. 161 and 162—Practice.

Where the trying Magistrate, at the instance of the accused, called for the statements of certain prosecution witnesses recorded by the police during their investigation in the special diary and then returned them to the police without recording an order that he did not think it expedient in the interests of justice to furnish the accused with a copy, and also disallowed an application to summon a defence witness :—

Held, that the Sessions Judge should re-hear the appeal and examine this witness, and send for the statements recorded by the police and, if he found anything in them of advantage to the accused, that he should also summon the witnesses who made them and allow cross-examination after supplying the accused with a copy of their statements.

THE petitioner, who was a Claims Inspector on the Eastern Bengal State Railway, was charged with criminal breach of trust as a servant under section 408 of the Indian Penal Code, and convicted by the Joint Magistrate of Alipore, on the 14th September 1908, and sentenced to three months' rigorous imprisonment and a fine of Rs. 500. In September 1907 the petitioner was deputed by the Railway Company to Goalundo where, it was alleged, he sold 180 bags of damaged rice to one Buldeo Thakur and received a *hundi* for Rs. 1,320 which he cashed in Calcutta, and of this sum he credited Rs. 820 to the Railway Company and misappropriated the balance. The trial commenced on the 3rd August 1908 upon further inquiry directed by the District Magistrate of Alipore, and on that day six prosecution witnesses were examined. The

*Criminal Revision No. 1378 of 1908, against the order of F. R. Roe, Sessions Judge of the 24-Parganas, dated Nov. 30, 1908.

case was next taken up on the 19th instant and four more prosecution witnesses were examined and four cross-examined. On the 21st, the other prosecution witnesses were cross-examined and a charge framed. The investigating police officer was then cross-examined by the defence, and admitted that statements of certain of the prosecution witnesses had been taken down in writing and were entered in the special diary. At the close of his cross-examination the counsel for the accused made a verbal application to the Magistrate for the production of these statements. The Magistrate, thereupon, ordered the police to produce the statements of these witnesses on the 1st September, on which date he passed the following order: "The statements called for by the defence from the Sealdah Police have been produced before me. They in no way contradict the evidence given, and I return them."

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The accused had also applied to the Magistrate to summon Mr. Hardless, the Government hand-writing expert, to prove that the signature of his name on the *hundi* was not in his hand-writing, but the Magistrate refused the application.

The Court then proceeded with the case and the defence witnesses were examined, and the accused was ultimately convicted and sentenced. On appeal, the learned Sessions Judge of Alipore upheld the conviction but reduced the sentence. The petitioner then moved the High Court and obtained the present Rule.

Mr. Norton, Mr. Mehta and Babu Manmatha Nath Mukerji,
for the petitioner.

The Deputy Legal Remembrancer (Mr. Orr), for the Crown.

HOLMWOOD AND RYVES JJ. We are of opinion that the best way of dealing with this Rule will be to direct that the learned Sessions Judge who heard the appeal should reconsider it after re-hearing counsel and examining Mr. Hardless as a witness. At the same time, as the petitioner has taken the ground that the statements before the police, whether contained in a special diary or in a diary under section 161

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of the Criminal Procedure Code, of Tilak Chand Borad and of Tilak Chand, were sent for but no order was passed stating that the Court did not think it expedient in the interests of justice to furnish him with a copy, we think that the learned Sessions Judge should himself send for and consider the statements of these two witnesses and, if he finds that there is anything in them upon which the petitioner would be advantaged by being allowed to cross-examine thereon, he should also re-summon those witnesses and submit them for cross-examination after supplying copies of their statements to the petitioner.

We, therefore, make the Rule absolute in these terms, and remit the case to the same learned Sessions Judge of Alipore for re-hearing the appeal.

The petitioner will remain on the same bail.

Rule absolute.

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Before Mr. Justice Carnduff and Mr. Justice Dosa.

1909
 Feb. 12.

SALIGRAM SINGH

v.

EMPEROR.*

Surety bond—Liability of Surety on forfeiture of bond by Principal—Recovery of amounts of the bonds from both Principal and Surety—Criminal Procedure Code (Act V of 1908), s. 514 and Sch. V, Form XI.

Upon the forfeiture of a bond by a person to keep the peace for a term, the surety is liable to pay the amount specified in his bond in addition to the penalty paid by the principal.

Emperor v. Nga Karung (1) dissented from.

The object of requiring a surety to such a bond is not to ensure the recovery of the amount of the bond from the principal, but to serve as an additional security for his keeping the peace.

Queen-Empress v. Rahim Bakhsh (2) referred to.

* Criminal Reference No. 234 of 1908, by C. W. E. Pittar, Sessions Judge of Patna, dated Nov. 27, 1908.

(1) (1905) U. B. R. 31 ;

(2) (1898) I. L. R. 20 All. 206.

2 Cr. L. J. Ind. 463.

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IN a proceeding under section 107 of the Code of Criminal Procedure, 1898, one Saligram Singh was bound down, in the sum of Rs. 100, to keep the peace for one year, and the petitioner, Kuldip Singh, bound himself as surety, in the sum of Rs. 50, that the former would not commit a breach of the peace or do any act that might probably occasion a breach of the peace during the term of the bond, and that, in case of his (Saligram's) making default therein, he (Kuldip) would forfeit to His Majesty the sum of Rs. 50. Saligram's bond was declared to be forfeited by the Sub-divisional Officer of Dinapore, on the 9th September, 1908, and both the petitioners were ordered to pay the amounts of their respective bonds. They appealed against the order to the District Magistrate who summarily rejected the appeal, on the 24th September, under section 515 of the Criminal Procedure Code, without considering the objection of the petitioner, Kuldip, that the lower Court was wrong in requiring a double penalty, Saligram having paid the amount of his bond.

The Sessions Judge of Patna, by his letter dated the 27th November, referred the case to the High Court under section 438 of the Code, recommending the reversal of the order of the District Magistrate on the ground that the point raised by Kuldip was worthy of consideration, and had not been dealt with by the Appellate Court. He referred to *Emperor v. Nga Kaung* (1).

No one appeared in the case.

CARNDUFF AND DOSS JJ. This is a reference made by the Sessions Judge of Patna which raises the question of the extent of the liability of a person who has stood surety for another bound down to keep the peace. It appears that one Saligram Singh was required by the Sub-divisional Magistrate of Dinapore to execute a bond for Rs. 100 under section 107 of the Code of Criminal Procedure, and that the petitioner, Kuldip, stood as his surety in the sum of Rs. 50. The bond was declared forfeit by the Sub-divisional Magistrate, who

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of the Criminal Procedure Code, of Tilak Chand Borad and of Tilak Chand, were sent for but no order was passed stating that the Court did not think it expedient in the interests of justice to furnish him with a copy, we think that the learned Sessions Judge should himself send for and consider the statements of these two witnesses and, if he finds that there is anything in them upon which the petitioner would be advantaged by being allowed to cross-examine thereon, he should also re-summon those witnesses and submit them for cross-examination after supplying copies of their statements to the petitioner.

We, therefore, make the Rule absolute in these terms, and remit the case to the same learned Sessions Judge of Alipore for re-hearing the appeal.

The petitioner will remain on the same bail.

Rule absolute.

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ordered the principal and the surety to pay the sums of Rs. 100 and Rs. 50 respectively. Against this order an appeal was preferred before the District Magistrate under section 515 of the Code, and was summarily rejected. One of the grounds taken on the appeal was that the Sub-divisional Magistrate was wrong in inflicting a "double penalty," the contention being that, as the principal had paid, there ought to have been no realisation from the surety. The learned Sessions Judge has recommended that the District Magistrate's order be set aside on the ground that he has not considered the point above stated. He has himself refrained from expressing any opinion upon it, but has referred to the decision in the case of *Emperor v. Nga Kaung* (1) which appears to have been decided in Upper Burma in 1905.

Primâ facie, no doubt, a surety merely agrees to pay the creditor failing the debtor, and his liability is, as a rule, co-extensive with that of the principal. But this is not a case of ordinary suretyship for the payment of money. As pointed out by Edge, C.J., in *Queen-Empress v. Rahim Bakhsh* (2), the object of these provisions of the Code is to prevent crime, and not to obtain money for the Crown. It is not, as in the case of, for example, an administration bond with sureties, the object to secure the payment of money or the avoidance of pecuniary loss. Hence it is provided in section 118 of the Code that the amount of every bond demanded under these provisions shall be fixed with due regard to the circumstances of the case and shall not be excessive, while in section 106 it is expressly directed that the amount of the principal bond shall be proportionate to the means of the person bound down. That being so, it is obvious that the power to require sureties must have been given with some object other than that of ensuring the recovery of the amount of the bond; in other words, an additional security for the principal's keeping the peace, not a surety for his paying forfeit, is demandable.

(1) (1905) U. B. R. 31 ;

2 Cr. L. J. Ind. 463.

(2) (1898) I. L. R. 20 All. 206; "

This view is supported by the form of the bond actually executed in this instance. Saligram Singh "bound himself not to commit a breach of the peace or do any act that might probably occasion a breach of the peace during the term of one year," and, "in case of his making default therein," to "forfeit to His Majesty the sum of Rs. 100." The petitioner, Kuldip, next "bound himself surety for Saligram Singh that he (Saligram) should not commit a breach of the peace or do any act that might probably occasion a breach of the peace during the said term, and, in case of his (Saligram's) making default therein, to forfeit to His Majesty the sum of Rs. 50." This is the form set forth as Form XI in the Fifth Schedule to the Code, and from its terms it seems to us to be clear that Kuldip bound himself to forfeit Rs. 50 in the event of Saligram's failing to keep the peace during the period fixed.

The conclusion at which we have arrived, therefore, is that the Sub-divisional Magistrate was right; and, in these circumstances, we think it unnecessary to send the case back for disposal by the District Magistrate as the first appellate authority. In the result, then, we decline to interfere.

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APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

1909
Feb. 12.

DHANU RAM MAHTO

v.

MURLI MAHTO.*

Commission—Practice—Evidence taken on commission, when evidence in suit—Practice on the Original Side of the High Court and the Mofussil Courts—When Court may grant time and adjourn Hearing—Costs of Adjournment—Civil Procedure Code (Act XIV of 1882), ss. 156, 389, 390.

Where a commission was duly executed and returned together with the evidence taken under it to the Court which issued it and formed part of the record of the case under s. 389 of the Civil Procedure Code (Act XIV of 1882), and where the circumstances mentioned in s. 390 of the Code, which would exclude the deposition from being read as evidence in the suit, do not exist :—

Held, that regard being had to the practice of the mofussil Courts, which is not only perfectly consistent but also in strict accordance with the provisions of the Civil Procedure Code, it is not necessary to tender the evidence taken on commission formally at a trial, to make it evidence in the case.

Man Gobindo Chowdhuri v. Shashindra Chandra Chowdhuri (1) followed.

Dwarka Nath Dutt v. Gunga Dayi (2), *Nistarini Dassee v. Nundo Lall Bose* (3), *Kusum Kumari Roy v. Satya Runjan Das* (4) and *Struthers v. Wheeler* (5) referred to.

Where the Court made an order for adjournment conditional upon the immediate payment of costs :—

Held, that although s. 156 of the Civil Procedure Code (Act XIV of 1882) gives the Court ample discretion as to the particular directions to be given in the matter of costs, an order ought not to be made conditional upon immediate payment of costs, without sufficient opportunity being given to the plaintiff to enable him to carry out the orders of the Court and to produce his evidence.

* Appeal from Appellate Decree No. 1332 of 1907, against the decree of H. E. Ransom, District Judge of Darbhanga, dated April 3, 1907, affirming the decree of Ambica Charan Dutt, Subordinate Judge of that District, dated Feb. 6, 1907.

(1) (1907) I. L. R. 35 Calc. 28.

(3) (1899) I. L. R. 26 Calc. 591.

(2) (1872) 8 B. L. R. App. 102.

(4) (1903) I. L. R. 30 Calc. 999, 1003.

(5) (1880) 6 C. L. R. 109.

SECOND APPEAL by the plaintiff, Dhanu Ram Mahto.

The plaintiff brought the suit for declaration of his title to certain immoveable property, and for an injunction to stay the sale of the said property.

The defence was that the claim was false and collusive. One witness was examined on commission on behalf of the plaintiff.

On the case coming on for hearing, the plaintiff through his pleader applied for time to bring up his witnesses who were not present. The Subordinate Judge granted the adjournment on condition that the cost of the day was paid by the plaintiff to the defendant. The plaintiff being unable to deposit the cost, the Subordinate Judge dismissed the suit without adjudicating on the merits.

The plaintiff appealed to the District Judge who dismissed the appeal on the ground that it was too late to ask the Court to consider the evidence taken on commission which was not tendered though the plaintiff had ample opportunity to do so, and that the learned Subordinate Judge had not omitted to consider anything material.

The plaintiff, thereupon, appealed to the High Court.

Babu Shorashi Charan Mitra, for the appellant. Under sections 389 and 390 of the Civil Procedure Code and the practice that had grown up in the mofussil Courts, it was not necessary to tender the deposition of a witness examined on commission, but that it formed a part of the record and could be used as evidence in the case : *Dwarkanath v. Gunga Dayi* (1), *Struthers v. Wheeler* (2), *Nistarini Dassee v. Nundo Lall Bose* (3). Under section 156 of the Civil Procedure Code the Subordinate Judge could not make the order for adjournment conditional upon the immediate payment of costs.

Babu Digambar Chatterjee, for the respondent. Evidence taken on commission cannot be used in evidence in the case

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(1) (1872) 8 B. L. R. App. 102.

(2) (1880) 6 C. L. R. 109.

(3) (1899) I. L. R. 26 Calc. 591.

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until tendered by the party at whose instance the commission has been taken out: *Kusum Kumari Roy v. Satya Runjan Das* (1), *Hemanta Kumari v. Banku Behari Sikdar* (2).

The Court has ample discretion to impose the payment of costs, conditional upon adjournment of a case under section 156 of the Code of Civil Procedure.

Cur. adv. vult.

MOOKERJEE AND CARNDUFF JJ. The plaintiff appellant commenced the action out of which the present appeal arises for declaration of his title to immoveable property and to restrain the defendants from enforcing a mortgage which they claimed to hold thereupon. The suit was instituted so far back as the 18th May 1903 and up to the present time it has not been heard on the merits. The plaintiff had at one stage of the suit obtained an order for the examination of a witness upon commission. That witness was duly examined, and the Commissioner made his return. When the case came on for trial before the Subordinate Judge, the evidence taken on commission was on the record, but as the witnesses who were to be examined in Court were not in attendance, an application was made on behalf of the plaintiff for adjournment. The Subordinate Judge made the grant of the application conditional upon the immediate payment of the costs of the defendant. The plaintiff was unable to carry out the order of the Court and the suit was dismissed. An appeal was then preferred to the District Judge, but it was dismissed by him under section 551 of the Code of Civil Procedure. The plaintiff has now appealed to this Court and on his behalf the decision of the Court below has been challenged on two grounds, namely, *first*, that as the evidence taken on commission was on the record, the suit ought not to have been dismissed without an adjudication on the merits; and, *secondly*, that the Court of first instance ought to have allowed him an opportunity to produce his other evidence. In answer to the first contention,

(1) (1903) I. L. R. 30 Cal. 999, 1003. (2) (1905) 9 C. W. N. 794.

it has been argued by the learned vakil for the respondent that as the plaintiff did not tender the deposition in evidence, the Subordinate Judge was not bound to consider it; and in answer to the second contention it has been suggested that the plaintiff was guilty of laches and was not entitled to any consideration from the Court.

In support of the first contention, reliance has been placed on behalf of the appellant upon the decision of this Court in *Dwarka Nath Dutt v. Gunga Dayi* (1), *Struthers v. Wheeler* (2), and *Nistarini Dassee v. Nundo Lall Bose* (3) which show that in order to make a deposition taken on commission available for purposes of the trial, it is not necessary formally to tender it in evidence. On the other hand, in support of the contention of the respondent, reliance has been placed upon the cases of *Kusum Kumari Roy v. Satya Runjan Das* (4) and *Hemanta Kumari v. Banku Behari Sikdar* (5), in which it was ruled that the deposition of a witness examined on commission does not become evidence in the suit until the same has been tendered and read as evidence by the party on whose behalf it has been taken. We observe that in the cases upon which reliance is placed on behalf of the respondent, the view of the Court was based upon the practice which has prevailed for many years past on the Original Side of this Court. On the other hand, as was pointed out by this Court in the case of *Man Gobindo Chowdhuri v. Shashindra Chandra Chowdhuri* (6), the practice in the mofussil Courts has been precisely in the opposite direction. There can be no doubt that in the mofussil Courts the deposition of a witness examined on commission is treated as evidence in the case even though it has not been formally tendered. In our opinion, this practice is not only perfectly consistent, but also in strict accordance with the provisions of the Code on the subject. Section 389 of the Code of 1882 provides that after the commission has been duly executed it shall be returned together with the evidence taken

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(1) (1872) 8 B. L. R. App. 102.

(2) (1880) 6 C. L. R. 109.

(3) (1899) I. L. R. 26 Calc. 591.

(4) (1903) I. L. R. 30 Calc. 999, 1003.

(5) (1905) 9 C. W. N. 794.

(6) (1907) I. L. R. 35 Calc. 28.

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under it to the Court from which it issued, and the commission, the return thereto and the evidence taken under it form, subject to the provisions of section 390, part of the record of the suit. Section 390 to which reference is made then provides that evidence taken on commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered unless the person who gave the evidence is beyond the jurisdiction of the Court or dead or unable from sickness or infirmity to attend to be personally examined or exempted from personal appearance in Court, or the Court in its discretion dispenses with the proof of any of the circumstances just mentioned and authorizes the evidence of any person being read as evidence in the suit notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same. Where, therefore, as in the case before us, the circumstances mentioned in section 390 which would exclude the deposition from being read as evidence in the suit do not exist, there is no reason why the deposition should be formally tendered before it can be treated as evidence in the cause. No doubt, it may be plausibly suggested, as indeed it has been suggested by some writers, that the mere fact that the deposition forms part of the record does not make it evidence, because every thing that is on the record may not be evidence in the suit till it has been made evidence in the manner contemplated by law. That may be so but the analogy has no application to the case before us. Here the deposition has been taken by a duly authorized commissioner; the parties had the opportunity to appear and examine and cross-examine the witness as contemplated by law. There is no suggestion that the commission has not been duly executed and returned; nor is there any room for suggestion that circumstances may exist which would exclude the deposition from being used as evidence under section 390. Under circumstances like these, it would be, in our opinion, an idle formality, not contemplated by the Code to require that the deposition must be formally tendered in evidence. The practice of the mofussil Courts as pointed out in the case of *Man Gobindo Chowdhuri v. Shashindra Chandra*

Chowdhuri (1) is entirely consistent with the provisions of the Code, and there is no reason why we should substitute for it a practice which has grown up in the Original Side of this Court. We do not think, it can rightly be suggested that there is anything on principle which makes it obligatory upon a party to tender a deposition formally at the trial. No doubt, if, as is provided in the English Rules of the Supreme Court, 1883, Order 37, Rule 24, there were any statutory rule that notice of intention to use a deposition at the trial should be given, the practice must be regulated accordingly. But in the absence of any similar provision in our Code of Procedure, we do not see why we should insist upon this formality. The deposition forms part of the record and either party may use it. If the opponent of the party who relies on the deposition has any objection to its admissibility, it is open to him to urge that point. But we do not see that there is upon principle any necessity to tender the deposition in evidence. That there is no real question of principle involved in the matter, would appear from the circumstance that under other systems of law, the practice which is followed in our mofussil Courts has been adopted; for instance, in the American Federal Courts, it is not necessary for a deposition duly taken on commission to be tendered in evidence; it is treated as already part of the record and may be used at once by either party: *Andrews v. Graves* (2), *Park v. Willis* (3). In our opinion, we ought to adhere to the practice which prevails in the mofussil Courts, and according to that practice, there is no question that the deposition in this case ought to have been considered by the Subordinate Judge. The first point taken on behalf of the appellant must consequently prevail.

As regards the second point taken on behalf of the appellant, it is contended that under section 156 of the Code of 1882, it was not open to the Subordinate Judge to make the order for adjournment conditional upon the immediate payment

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(1) (1907) I. L. R. 35 Cal. 28.

(2) (1870) 1 Dillon 108;

1 Fed. Cases 894,

(3) (1806) 1 Cranch. C. C. 357;

18 Fed. Cases 1108,

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of costs. It is suggested that if in the opinion of the Subordinate Judge, an adjournment was necessary in the interests of justice, the object of the grant of an adjournment ought not to have been defeated by the imposition of an order for costs, inability to comply with which would nullify the very object which the Court had in view. In our opinion, there is no foundation for the broad contention that the Court could not make an appropriate order for costs; the second paragraph of section 156 clearly gives the Court ample discretion as to the particular directions to be given in the matter of costs occasioned by the adjournment. At the same time, we are of opinion that in the circumstances of this case, the Court might have adjourned the case to a subsequent date and made the hearing on that date conditional upon the payment of costs before that date. Such an order would have enabled the plaintiff or his legal adviser to comply with the order for costs. We are of opinion, therefore, that sufficient opportunity was not given to the plaintiff to enable him to carry out the order of the Court and to produce his evidence.

The result is that this appeal must be allowed, the decrees made by the Courts below discharged and the case remitted to the Court of first instance to be tried on the merits. Both parties will be at liberty to adduce evidence in support of their respective claims.

As regards the costs of this appeal, they must abide the result, but there will be no order for costs in the lower Appellate Court. The costs in the Court of first instance up to this stage as also after the remand will be in the discretion of that Court.

*Appeal allowed ;
case remanded.*

APPELLATE CRIMINAL.

Before Mr. Justice Caspersz and Mr. Justice Ryves.

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Cheating—Evidence—Obtaining by false representation money as pretended security for appointment to office—Admissibility of proof of previous and subsequent similar but unconnected transactions as evidence of dishonest intention on the occasion in question—Part of a systematic series of similar fraudulent transactions—Evidence Act (I of 1872), ss. 14, Expl. (1), Illus. (o); 15, Illus. (a).

On a charge against the accused of cheating by falsely representing that he was the *dewan* of an estate and could procure for the complainant appointment to the vacant post of manager to the estate, and thereby obtaining a sum of money as a pretended security deposit, evidence of instances of similar but unconnected transactions with other persons, before and after the date of the offence charged, is admissible, under ss. 14 and 15 of the Evidence Act, not to establish the *factum* of the offence but to prove that the transaction in issue was one of a systematic series of frauds, and that the intention of the accused on the particular occasion in question was dishonest and fraudulent.

Explanation (1) and Illus. (o) to s. 14 of the Evidence Act render facts showing the existence of a state of mind relevant only if they establish that such state of mind existed in reference to the particular matter in issue.

Section 15 is an application of the general rule laid down in s. 14, and the words of the section as well as of Illus. (a) show that it is not necessary that all the acts should form parts of one transaction, but that they should be parts of a series of *similar* occurrences.

Reg. v. Holt (1) discussed and distinguished.

Queen v. Francis (2), *Reg. v. Rhodes* (3), *Reg. v. Ollis* (4), *Rex v. Wyatt* (5), *Rex v. Bond* (6), *Makin v. Atk.-Gen. for New South Wales* (7) and *Queen-Empress v. Vajiram* (8) followed.

On the 26th January 1908 the accused, who was travelling by train on the B. and N.-W. Railway, sent for and

* Government Appeal No. 2 of 1909, against the order of acquittal by the Sessions Judge of Darbhanga, dated July 23, 1908.

(1) (1860) Bell C. C. 280.

(5) [1904] 1 K. B. 188.

(2) (1874) L. R. 2 C. C. R. 128.

(6) [1906] 2 K. B. 339.

(3) [1899] 1 Q. B. 77.

(7) [1894] A. C. 57.

(4) [1900] 2 Q. B. 758.

(8) (1892) I. L. R. 16 Bom. 414.

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entered into a conversation at Bazidpore station with one Boodrie, the guard of the train, and, representing himself to be the *deewan* of the Narhan Raj, informed him that the post of manager to the estate, on a monthly salary of Rs. 300, was vacant, but that a security deposit of Rs. 1,600 was required, and asked him if he knew of any one with suitable qualifications for the post. Boodrie replied that he possessed some experience of zemindari work and would like to obtain the appointment himself, but that he was unable to furnish the necessary amount of security. The conversation was renewed when the train stopped at Sonapore station, and Boodrie intimated his ability to give Rs. 70 as security which the accused accepted as more was not available. On the next day Boodrie sent the accused the amount by money order to his address at Bankipore which was duly received and acknowledged by him by letter. Some correspondence then passed between the parties on the subject, and an interview was arranged by the accused at the Hajipur *dāk* bungalow at which Boodrie was informed that the Raja was willing to accept Rs. 100 as security, and the balance Rs. 30 was accordingly remitted by him, on the 14th February, to the accused who acknowledged its receipt. Subsequently, Boodrie became suspicious on over-hearing a conversation between Mahboob Hossain, the assistant station-master of Patori, and the signaller there, and he learnt that the accused had also attempted to obtain money from Mahboob on similar representations, and informed the police on the 23rd March. It was proved that the accused was in no way connected with the Narhan estate at the time, though he had, some two or three years before, been *deewan* to the estate for a short period. The estate was at the time of the present occurrence under the Court of Wards, and there was no post of manager or any other post with a salary of Rs. 300 vacant.

At the trial the Magistrate admitted evidence of similar but unconnected instances of obtaining or attempting to obtain money from other Railway employees on the following occasions :—

(i) At the end of January or the beginning of February 1907, the accused told Abhoy Chundra Ghose, station-master

of Kishunpore, that he was employed as manager to the estate of Rai Durga Prosad, that a post as tehsildar to the estate, on Rs. 50 a month, was vacant and that he could obtain it for Abhoy's son on receipt of a security deposit of Rs. 300, which amount was sent to him. As his son did not get the post, Abhoy wrote several times to the accused demanding the return of his money, and ultimately sent him a pleader's letter threatening with a criminal prosecution, whereupon he returned Rs. 200.

(ii) At the end of February or the beginning of March 1907, the accused told Gideon, carriage examiner at Samastipur, that he was head manager of the Darbhanga Raj, and could procure his appointment as sub-manager, on a salary of Rs. 300 *per* month, on his furnishing a security deposit of Rs. 500 in advance. Gideon consulted a pleader and was advised not to send the money before obtaining the appointment.

(iii) Towards the end of February 1908, the accused represented to Mahboob Hossain, assistant station-master of Patori, that he was the manager of the Tikari Raj and could obtain for him a tehsildarship, on a monthly salary of Rs. 50, on his depositing Rs. 300 as security. The application was written out then and there and was to have been submitted with the security to the accused, but Mahboob, while conversing with a signaller on the subject, was over-heard by Boodrie who then informed him of the offer made to him of the appointment of manager to the Narhan Raj, and Mahboob was dissuaded from sending any money.

In each of these cases it was proved that the accused was in no way connected at the time with the estates mentioned by him and that no such appointments as alleged were then vacant.

The defence story, as set up by one Dinesh Prosad for the accused but not by the latter himself in any statement, was that Dinesh, who was the manager of the Fatehpore Dularpore estate, wanted a sub-manager on Rs. 75 *per mensem* with a security deposit of Rs. 1,000, and the accused remitted him the sum received from Boodrie by messenger as part payment of the security for the post. Dinesh subsequently, it was alleged, sent for Boodrie through the accused in connection with the

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appointment, but he failed to appear and Dinesh, thereupon, retained the sum advanced by him.

The accused was convicted under section 420 of the Penal Code, and sentenced by the Magistrate, on 3rd July 1908, to four months' rigorous imprisonment and a fine of Rs. 300 and in default to a further term of three months' imprisonment. On appeal, the Sessions Judge of Darbhanga acquitted him by his order, dated the 23rd July 1908, holding that the direct evidence in support of the charge as to the occurrence of the 26th January 1908 standing alone insufficient, and that the evidence relating to similar instances of cheating or attempting to cheat was not admissible. The Bengal Government thereupon instituted the present appeal.

The Advocate-General (Hon'ble Mr. Sinha) with the Deputy Legal Remembrancer (Mr. Orr), for the Crown. Evidence of similar acts of cheating are not admissible to prove whether, as a matter of fact, the accused made the representations alleged to Boodrie and induced him to part with the 100 Rupees. This has been amply proved by other evidence in the case. But such evidence is admissible, under sections 14 and 15 of the Evidence Act, to rebut the defence that the transaction was *bonâ fide* and not fraudulent by showing that both previously and shortly after the accused had similar transactions with others, which, taken together, showed dishonest intention on his part, and also that the present case was one of a series of fraudulent transactions similar in character. The English decisions establish this rule: *Queen v. Francis* (1), *Regina v. Rhodes* (2), *Regina v. Ollis* (3). There are two recent cases on the point: *Rex v. Wyatt* (4) and *Rex v. Bond* (5). See also *Queen-Empress v. Vajiram* (6).

Mr. Huq (Mr. Lall, Babu Dwarka Nath Mitter and Babu Kulwant Sahai with him), for the accused. Section 15 is not applicable as there is no question here of accident or mistake.

(1) (1874) L. R. 2 C. C. R. 128.

(2) [1899] 1 Q. B. 77.

(3) [1900] 2 Q. B. 758.

(4) [1904] 1 K. B. 188.

(5) [1906] 2 K. B. 389.

(6) (1892) I. L. R. 16 Bom. 414.

Evidence of previous and similar acts of cheating or attempting to cheat Boodrie might be admissible, but not acts of cheating or attempting to cheat others, the transactions being separate: section 14, *Expl. (1)* and *Illus. (o)*, and *Regina v. Holt (1)*, *Makin v. Att.-Gen. for New South Wales (2)*. The cases of *Regina v. Rhodes (3)* and *Queen-Empress v. Vajiram (4)* are distinguishable, as the different fraudulent acts there formed parts of one transaction.

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Cur. adv. vult.

CASPERSZ AND RYVES JJ. This is an appeal by the Local Government of Bengal against the appellate judgment of the learned Sessions Judge of Darbhanga, dated the 23rd July 1908, setting aside the conviction of Debendra Prosad who had been convicted by the Sub-divisional Magistrate of Samastipur, on the 3rd of July 1908, under section 420 of the Indian Penal Code, and sentenced to undergo rigorous imprisonment for four months and to pay a fine of Rs. 300 or, in the event of non-payment, to an additional term of three months' rigorous imprisonment.

We have heard the learned Advocate-General on behalf of the Crown and the learned counsel for the accused. The facts of the case are set out carefully and accurately in the judgment of the Sub-divisional Magistrate, and we do not propose to recapitulate them at length. Stated briefly, it appears that, on or about the 26th of January 1908, the accused, who was then travelling by train in a second class compartment, at Bazidpore station sent for one Boodrie who was then acting as the guard of the train. He told Boodrie that he was the *dewan* of the Narhan Raj estate, and that the post of manager to the estate, carrying a monthly salary of Rs. 300, was vacant, and asked him if he knew of any one with suitable qualifications for the post. Boodrie said that he himself had some experience of zemindari work and would like to obtain

(1) (1860) Bell C. C. 280.

(2) [1894] A. C. 57.

(3) [1899] 1 Q. B. 77.

(4) (1892) I. L. R. 16 Bom. 414

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the post for himself, but stated that he would be quite unable to give the security of Rs. 1,600 which, the accused said, must be given. The conversation was renewed when the train stopped at Sonapore station, where Boodrie said he could give Rs. 70 as security, and the accused agreed to accept it if more was not available. On the next day, Rs. 70 was sent to the accused by Boodrie by money-order, and the accused received the money and acknowledged it by a letter on the record. To put the matter shortly, after some correspondence, at an interview arranged at the Hajipur *dâk* bungalow by the accused, Boodrie was given to understand that the Rajah was willing to accept Rs. 100 as security, and Rs. 30, to complete this sum, was, on the 14th of February, despatched to the accused, and its receipt by him has been proved. On a subsequent occasion Boodrie over-heard a conversation among some Railway men connecting the accused's name with alleged fraudulent advertisements for a manager on Rs. 300. His suspicions were aroused and he informed the police. Boodrie swears that he believed the accused's statement that he was *devan* of the Narhan estate and was in a position to obtain for him the post of manager on Rs. 300 a month, and that it was in consequence of this that he sent the accused the sum of Rs. 100. The substantial accuracy of Boodrie's evidence as to the first conversation between him and the accused at Bazidpore station is corroborated by the statement of Nawab Thakur who was the brakesman of the same train and was with Boodrie at the time. It has also been proved that the accused at that time was not in any way connected with the Narhan estate, although there is evidence that he had some two or three years previously been *devan* for a short time. It is also proved that the estate was then under the Court of Wards, and that there was no post of manager or other post with a salary of Rs. 300 vacant. It is admitted that the accused received the sum of Rs. 100, and that he has not repaid any portion of it though a refund had been demanded.

On these facts alone, it seems to us that the offence of cheating has been made out. In the Court of the Sub-divisional

Magistrate, however, other evidence was tendered to show that the accused had obtained or attempted to obtain, at or about the same time, sums of money from other persons under very similar circumstances, that is, by falsely alleging himself to be the manager of one estate or another and offering to obtain posts under himself in the particular estate, and had thereby induced or attempted to induce other persons to advance him sums of money by way of security. Objection was taken at the trial to the admission of this evidence. The Sub-divisional Magistrate, however, admitted it under the provisions of sections 14 and 15 of the Indian Evidence Act. That evidence may be summarized as follows. About the end of January or beginning of February 1907 the accused accosted one Abhoy Chundra Ghose, who was then station-master of Kishunpore, and told him that a post of tehsildar, on Rs. 50 per month, was vacant in the estate of Rai Durga Prosad in which he was employed, and that he could obtain the post for Abhoy Chundra Ghose's son on receipt of security for Rs. 300. The witness remitted Rs. 300 to the accused. He had previously known that the accused had been *dewan* in the Narhan estate, and swore he believed his statements. As his son did not get the appointment he wrote on several occasions to the accused on the subject, but was put off. Losing patience eventually, after waiting some nine months or so, he wrote several times demanding the refund of his money. Failing to get it, he put the matter in the hands of his pleader who threatened to institute proceedings against the accused. Eventually Rs. 200 was remitted by the accused to the witness. It is proved that at that time the accused was in no way connected with the estate of Rai Durga Prosad.

On another occasion, about the end of February or beginning of March 1907, the accused got into conversation with one Gideon, a carriage-examiner on the Railway at Samastipur station, and, after some conversation about his pay and prospects on the Railway, told him that he was head manager of the Darbhanga Raj, and that he could get him a post of sub-manager on Rs. 300 a month in consideration of the witness

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depositing Rs. 500 as security with him in advance. He wrote many letters to the witness subsequently on the subject, and two of them, dated the 3rd and the 9th of March 1907, respectively, are on the record informing him that the appointment would be made on the 15th of April, but that cash in advance must be sent. Gideon, however, consulted a pleader who advised him not to send the money until he obtained the appointment. He did not get the appointment, and it is proved that the accused at the time was not in any way connected with the Darbhanga estate, and it is further proved that no such appointment as he offered was vacant. Similarly the accused, in February 1908, told Mahboob Hossain, assistant station-master at Hatori, that he was employed in the Tikari Raj and could obtain for him a tehsildarship in that estate on Rs. 50 a month, and got him there and then to write out an application for the post. This was to be sent with Rs. 300 as security. The witness said that he would consult his father, and the accused replied that he would be returning the next day but one, and would then receive the application and the money. He then proceeded on his journey. While the witness was having some conversation with another railway employee on the platform, as to whether it was usual to give security before or after appointment, the conversation was over-heard by Boodrie whose suspicions were aroused and communicated; and in the result the witness did not send the money. It is also proved that the accused had no connection with the Tikari Raj.

The defence of the accused is a strange one. He cross-examined the prosecution witnesses as if to show that he was in a position to obtain a managership on behalf of the Rani's private estate, and that she was desirous to be free from the Court of Wards. He himself declined to make any statement, and his story is told by his witness, Dinesh Prosad, who says that he (the witness) is manager of the Fatehpore Dularpore estate, the malik of which is one Mohunt Gulcharan Bharati. He was looking out for an assistant manager on Rs. 75 a month with Rs. 1,000 security, and he received from the accused two

remittances by a messenger of Rs. 70 and Rs. 30, as part security advanced by one J. Boodrie who was said to be an applicant for the post. The witness subsequently sent for Boodrie through the accused to meet him in connection with the appointment, but, as Boodrie had failed to come, he considered himself justified in keeping the hundred rupees, though, as he alleged himself, the appointment had been filled up by the appointment of his own younger brother. In corroboration of this story, four letters are put in, purporting to be letters written by the accused to the witness or by the witness to the accused respectively. This story has been totally disbelieved by the Sub-divisional Magistrate, and it is unnecessary to recapitulate the good reasons which he has given for his conclusion. It is exceedingly unlikely that Boodrie, who was getting Rs. 60 a month as pay and making on an average altogether about a hundred a month, including "over-time work," would throw up his appointment to undertake a post of this kind on a salary of Rs. 75. There are besides, when the letters put in on behalf of the defence are read along with the letters written by the accused to Boodrie, such obvious inconsistencies as to make us believe that the letters put in by the accused in his defence were concocted subsequently, after the Police had begun to investigate the case. None of the envelopes in which the letters would have been contained have been produced, so that there is no guarantee, by a comparison of any post-mark, that the dates which any of them purport to bear were genuine. It is also very significant that, when this witness was examined by the Police, he did not then produce the letters, although he admitted in his cross-examination that the letters were then in his office, only a few yards distant from the place where he was being examined. The witness made over these letters to the police about a week afterwards.

There is one other point in the case, namely, whether the Sub-divisional Magistrate who tried the case had jurisdiction to try it. That point, however, we need not now consider.

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The accused appealed to the learned Sessions Judge with the result which we have stated at the commencement of this judgment. We are wholly unable to appreciate the reasons given by the learned Sessions Judge for the conclusion at which he has arrived. He seems to have been impressed with difficulties in the case which we think have no existence. He makes no attempt whatever to analyse or criticize either the evidence for the prosecution or that of the defence, and has come to no finding as to whether either story is true or false. After dealing at some length with the question of jurisdiction, he says: "The direct evidence in support of the charge is very slight. I need not detail it as the Magistrate himself considers, and it is conceded on behalf of the Crown, and in my opinion quite rightly, that that evidence alone is not sufficient to sustain the charge. The case really rests on certain other evidence which, it is contended for the appellant, has been wrongly admitted." After discussing at some length whether that evidence, which related to other similar instances of cheating were admissible or not, he comes to the conclusion that it was inadmissible and excludes it from consideration. He goes on to say—"there being thus no evidence to support the charge, it follows that the charge cannot be sustained, and the conviction and sentence are set aside."

We are quite at a loss to understand how the learned Judge came to hold that the Sub-divisional Magistrate himself considered that the direct evidence in the case was insufficient to support the conviction. The only passage in the Sub-divisional Magistrate's judgment which could possibly lead to such an inference occurs in that portion of the judgment in which he discusses the relevancy of the other instances of cheating or attempts at cheating by the accused deposed to by various witnesses. He says "I have decided to admit the evidence (*re* the other alleged frauds), and based my decision" (*i.e.*, to admit it) "not merely on that same section of the Evidence Act on which the defence rely, section 14, but also on section 15 of the same Act supported by various rulings. The evidence is to my mind relevant as showing the state of mind,

amounting in this case to absence of good faith, in which the accused made his offer to Boodrie. It is also relevant under section 15 of the Act to show the intention of the accused in making that offer. Without that evidence we have merely an isolated promise by the accused to secure at no specified date an appointment which, as it happens, he is unable to give. Admit the evidence, and the offer to Boodrie stands out in its true colours." It is obvious that what the Magistrate here means to state is not his opinion that the direct evidence for the prosecution is insufficient to maintain a conviction, but that the outside evidence, if we may so call it, when admitted, negatives the assertion made on behalf of the accused that all that the prosecution story really amounts to is nothing more than that on an isolated occasion the accused promised to secure at some future unspecified date an appointment which, as it so happened, he was unable to give. It is quite clear, reading the judgment of the Sub-divisional Magistrate, that he believed the direct evidence for the prosecution and it follows, therefore, that even if he wrongly thought that, as a matter of law, the offence of cheating had not been established, the learned Sessions Judge should not, for that reason alone, have disregarded all that evidence. Nor can we understand how it could have been conceded on behalf of the Crown that that evidence was insufficient. At most, such an admission could only be regarded as one of law, and certainly does not estop the Crown from now urging, as it does, that the case is made out both by the direct evidence and by the other evidence on the record. Before us the main argument has turned on the admissibility of this outside evidence, and a large number of rulings, chiefly of the Courts in England, have been cited. Although we have come to the conclusion that the direct evidence in the case is sufficient for a conviction, we think it is necessary for us to decide the point, having regard to the arguments which have been addressed to us and, as we think, the erroneous views expressed by the learned Sessions Judge.

On behalf of the Crown it is conceded that this outside evidence cannot be admitted to prove the actual facts of the

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case, but it has been argued that satisfactory evidence *abunde* has been given to prove the incidents and fact of the transaction between the accused and Boodrie. This outside evidence is admissible to rebut the defence set up, or which might be set up, by the accused, as foreshadowed by the cross-examination of the complainant (the fact that eventually a totally different defence was set up would seem to be immaterial), namely, that his intentions at the time were not fraudulent, by showing that, at or about the same time, both previously and subsequently, the accused had similar transactions with other persons which, taken together, showed a dishonest intention on his part and also showed that the present transaction was only one incident in a series of fraudulent transactions all of which were similar in their nature, and might be regarded as proving a systematic series of frauds.

On behalf of the accused, it is argued on general principles that evidence of previous criminal acts is wholly irrelevant in a subsequent trial. It is further contended that the first *Explanation* to section 14 and *Illustration (o)* to that section show that section 14 is wholly inapplicable. It is argued that instances in which the accused had cheated or attempted to cheat Boodrie might be relevant but not attempts to cheat other persons.

It seems to us that the first *Explanation* to section 14 of the Indian Evidence Act only amounts to this that facts showing the existence of any state of mind, as instanced in the section, are relevant only if they show that that state of mind exists in reference to the particular matter in issue. In other words, they are only relevant if they show in this case the state of mind of the accused in reference to the particular transaction with Boodrie. This seems clear from *Illustration (o)* where the issue at trial is whether A murdered B by shooting him. The fact that A had previously been in the habit of shooting at other persons would not render it more probable or less probable that it was A, and not somebody else, who shot B on the occasion in question. On the other hand, if it could be shown that A had on previous occasions attempted to shoot B,

that would be some evidence which might lead the Court to believe it probable that on this occasion it was A who shot B.

Great reliance has been placed on the case of *Reg. v. Holt*.⁽¹⁾ There Holt was charged for obtaining, on the 15th April, a sum of money by false pretences from one Hirst by representing that he had been authorized by Uttley to receive that sum on his behalf for goods delivered in pursuance of an order taken by Holt. On behalf of the prosecution evidence was tendered to prove that Holt, on a day not specified, but within a week from the said 13th April, had obtained from another person a sum of money by a like representation. This evidence was admitted and Holt was convicted. The Court of Crown Cases Reserved disposed of the matter in the following terms: "This conviction must be quashed. In the statement of the case submitted to us we cannot find any facts that would warrant us in saying that the evidence was admissible." No reasons whatever are given for the decision. It seemed to us, however, that this case may be distinguished on the one or the other of two grounds: (i) because the second instance of false representation proved was subsequent to the one at trial, and, therefore, might not be a reliable test of the accused's state of mind or intention on the first occasion. This objection, however, would seem to affect the weight to be attached to the evidence regarding the former transaction rather than its admissibility, and (ii), as suggested by Blackburn, J., during the argument in *Queen v. Francis* ⁽²⁾, and as apparently accepted by Bruce, J., in *Regina v. Ollis* ⁽³⁾ and Lawrence, J., in *Rex v. Bond* ⁽⁴⁾, the only question at issue was "had Holt authority or not." If Holt's criminality depended on the answer to this question in the negative, obviously, the fact that Holt had acted on one or more occasions as if he had actually received such authority would be no evidence to prove that, as a matter of fact, he had not. On the contrary, it might be an equally good argument in his defence as showing at least his *bonâ fide* belief that he had authority. The report of the case of *Reg. v. Holt* ⁽¹⁾ is so

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(1) (1860) Bell. C. C. 280.

(2) (1874) L. R. 2 C. C. R. 128, 130.

(3) [1900] 2 Q. B. 758, 775.

(4) [1906] 2 K. B. 389, 424.

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meagre, and the judgment is so worded, that it is difficult to say what were the exact points on which the Court based its decision. There appears, however, to be force in an observation in Phipson's "Law of Evidence" (4th edition, page 162) that "the explanation of Blackburn, J., does not, however, satisfactorily explain *Regina v. Holt* (1), for there the evidence was tendered not to prove want of authority, of which evidence had been given *aliunde*, but to show that Holt's misrepresentation was made with guilty knowledge."

In *Queen v. Francis* (2), the case of *Regina v. Holt* (1), though it is mentioned and referred to by Blackburn, J., in the course of argument, is not mentioned in the judgment. This was a case in which the accused was indicted for attempting to obtain money from a pawn-broker by false pretences by alleging that a ring which he had offered to pawn was a diamond ring. His defence was that he did not know that the ring was false, that he received it to pawn from another person and believed that person's assertion that it was a diamond ring. Evidence was tendered to prove that Francis had shortly before offered other false articles to other pawn-brokers. This evidence was admitted and proof was given of three other instances in which the accused had obtained or attempted to obtain money from other pawn-brokers on false articles of jewellery. The Court of Crown Cases Reserved held that the evidence was admissible. Lord Coleridge said : "It seems clear upon principle that when the fact of the prisoner having done the thing charged is proved, and the only remaining question is whether, at the time he did it, he had guilty knowledge of the quality of his act or acted under a mistake, evidence of the class received must be admissible. It tends to show that he was pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake."

In *Regina v. Rhodes* (3) the case of *Regina v. Holt* (1) was distinguished by Lord Russell in the following terms :—"There the false pretence charged was a distinct and separate trans-

(1) (1860) Bell. C. C. 280.

(2) (1874) L. R. 2 C. C. R. 128.

(3) [1899] 1 Q. B. 77, 82.

action, and the fact that the prisoner had subsequently made a similar false pretence had no bearing on his guilt or innocence of the particular charge preferred. *Queen v. Francis* (1) is nearer to the present case, and, although there it is true that the transaction admitted in evidence was prior to that on which the charge was founded, yet it seems to me that the reasoning of the case will apply here." This case, it is argued by learned counsel for the defence, is distinguishable from the present case because there all the frauds were the result of one and the same advertisement and were, therefore, so closely connected with each other as to form a part of one transaction.

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The next English case to which our attention has been called is *Regina v. Ollis* (2). The difficulty of reconciling the case of *Regina v. Holt* (3) with the subsequent rulings becomes apparent if the judgment of Lord Russell and of the majority of the Bench is compared with that of Bruce, J., who in concurrence with Ridley, J., dissented: see also the judgment of Bray, J., in *Rex v. Bond* (4). In that case the question was whether the accused, when he obtained money on a cheque, knew that he had not funds at the bank to meet it. To show that he had this knowledge, evidence was given to prove that, on three dates about the same time, he had obtained money on other cheques which were dishonoured. Lord Russell said: "In the opinion of the majority of the Court, and in my own opinion, it was relevant as showing a course of conduct on the part of the accused and a belief on his part that the cheques would not be met. The accused gave cheques on June 24 and 26 which were dishonoured, and finally, a further dishonoured cheque on July 6, all three cheques having been drawn on the same bank as the first dishonoured cheque was drawn upon. It is impossible to say that all these facts were not relevant as showing an intention to defraud." Bruce, J., on the other hand, said: "It is difficult to distinguish *Regina v. Holt* (3) from the present case." He goes on

(1) (1874) L. R. 2 C. C. R. 128.

(2) [1900] 2 Q. B. 758.

(3) (1860) Bell. C. C. 230.

(4) [1906] 2 K. B. 389.

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to say "In the present case there was no question of accident or mistake, the question was knowledge or no knowledge of the state of the bankers' account or of circumstances raising a belief in the mind of the prisoner respecting the state of his bankers' account;" and he held that "the successive acts of passing at different dates genuine cheques, falsely pretending that they are valid, are not necessarily successive acts of the same character, because the quality of each successive act depends upon the knowledge of the person passing the cheque, of circumstances existing at the time external to the instrument itself and varying in character from day to day."

From these cases it seems to us that the weight of authority is decidedly in favour of the view we adopt.

We, however, have traced still more recent authorities on the same side. In *Rex. v. Wyatt* (1), the accused was indicted for obtaining credit on false pretences. He hired furnished apartments from the prosecutrix and went away after three days' occupation of the premises without payment. At the trial evidence was admitted to prove that he had on several previous occasions hired apartments from various other persons and left without payment, the money being still due when he hired the rooms of the prosecutrix. Lord Alverstone, C. J., and four Justices held "this evidence was clearly admissible as tending to establish a systematic course of conduct on the part of the accused, and as negating any accident or mistake or the existence of any reasonable or honest motive," and confirmed the conviction. To the same effect is *Rex. v. Bond* (2), where Bray, J., pointed out that evidence of the kind under discussion is admissible "(i) where the prosecution seeks to prove a system or course of conduct, (ii) where the prosecution seeks to rebut a suggestion on the part of the prisoner of accident or mistake, (iii) where the prosecution seeks to prove knowledge by the prisoner of some fact."

These cases are precisely in point, and in any view we think section 14 of the Evidence Act does make the outside evidence in this case admissible. The case of *Queen-Empress v.*

(1) [1904] 1 K. B. 188.

(2) [1906] 2 K. B. 389, 414.

Vajiram (1) seems to support this view, although that case is sought to be distinguished on the ground that the various fraudulent acts were all committed with the object of evading one and the same decree, and were all done on the same day, and, therefore, as in the case of *Regina v. Rhodes* (2), formed parts of one transaction.

Section 15 of the Evidence Act is an application of the general rule laid down in section 14, and the words of the section as well as of *Illustration (a)* show that it is not necessary that all the acts should form parts of one transaction, but that such acts should form parts of a series of *similar* occurrences.

Our view as to the admissibility of the evidence in this case is, we think, supported by the well-known case of *Makin v. Attorney-General for New South Wales* (3).

Taking the whole evidence in the case, it seems to be established that the accused attempted to obtain money from various subordinate Railway officials, who were drawing small salaries, by representing himself as the manager of an important and wealthy zemindari estate, and offering to obtain lucrative appointments for them under himself in consideration of their advancing to him a sum of money by way of security. As a matter of fact, there were no such appointments available, and, in any event, the accused could not have secured them for his nominee. The false representations in every case were of the same character and were made to persons similarly situated. We think this particular transaction with Boodrie was one of a series of similar frauds, and that, therefore, the evidence of the other frauds was admissible in Boodrie's case to prove that the obtaining of money by accused from Boodrie was dishonest and fraudulent.

For these reasons we allow the appeal, and setting aside the order of the learned Sessions Judge restore that of the Sub-divisional Magistrate. The sentence seems to us very lenient, but, as another case against the accused is before us, we do not think it necessary to interfere with the sentence.

Appeal allowed.

(1) (1892) I. L. R. 16 Bom. 414.

(2) [1899] 1 Q. B. 77.

(3) [1894] A. C. 57.

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[On appeal from the High Court at Fort William in Bengal.]

Hindu law—Custom—Primogeniture, rule of—Orissa and Cuttack, Land Tenure in—"Paharaj"—"Chowdhuri"—Hereditary Office, land attached to—Regulation XI of 1793—Regulation XII of 1805, s. 3^d—Regulation X of 1800—Statements of deceased persons—Evidence Act (I of 1872) ss. 21 and 32, clause (5)—Proof of Custom.

The appellants and respondents were members of a Brahmin family long established and possessed of an estate in Cuttack. To a suit by the appellants for partition of the estate on the ground that it was joint family property governed by the ordinary Hindu law of the Mitakshara School, the defence was that a custom of lineal primogeniture prevailed in the family by which, from a period prior to British rule, the estate had always descended to the eldest son, the junior members of the family being entitled only to maintenance and not to any share of the land. The only reliable evidence of the status of the family during the period of native rule consisted of documents of ancient date which showed that the office of Chowdhuri had been held in succession for many generations by a member of the family, and that to the holder of that office certain lands called "nankar" were assigned as part of his remuneration. The Subordinate Judge decreed the suit holding on the evidence that the custom was not proved, but the High Court reversed that decision being of opinion that the evidence was sufficient to establish the custom:—

Held, by the Judicial Committee reversing the decision of the High Court, that the evidence fell far short of establishing the custom during the period of native rule. From the documents produced, it appeared that the grant of the office of Chowdhuri was one of an office only; that the office was revocable at the pleasure of the sovereign, and though generally heritable, it might be conferred by him not merely on the eldest son, but upon any member of the family, or indeed upon anybody. These considerations, though they might suggest a presumption, were not sufficient to establish a right, for which purpose the evidence must be clear and unambiguous.

With regard to the history of the family and their estate after the advent of the British Government, the evidence showed that whenever the holder of the estate died leaving more than one son, the right of the eldest son was challenged in the Courts and the litigation invariably ended in a compro-

* *Present*: LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOBLE and SIR ARTHUR WILSON,

mise under which the younger sons obtained a share of the estate very much in excess of the maintenance to which, had the custom existed, they would have been entitled. The evidence, therefore, entirely failed to give to the alleged custom the character of certainty which was essential to its validity.

APPEAL from a judgment and decree (21st March 1904) of the High Court at Calcutta which reversed a judgment and decree (27th September 1899) of the Subordinate Judge of Cuttack.

The plaintiffs were appellants to His Majesty in Council.

The main question for determination in this appeal was whether the succession to the property in suit was governed by the rules of lineal primogeniture, or by the ordinary Hindu law.

The history and facts of the case besides being fully set out in the judgment of their Lordships of the Judicial Committee, are sufficiently stated in the report of the case before the High Court which will be found in I. L. R. 32 Calc. 6.

The High Court (PRATT and GEIDT JJ.) upheld the custom of primogeniture which was set up by the present respondent, the defendant in the suit.

ON this appeal,

De Gruyther K.C. and *E. U. Eddis*, for the appellants, contended that the evidence on the record was not sufficient to establish a custom of lineal primogeniture. All it showed was that during the period of native rule in Cuttack, namely, up to 1803, the eldest son took the title of Paharaj, and that the office of Chowdhuri had been held by members of the family in succession; but that office was nothing more than a Revenue office, "a remnant of the old Hindu fiscal organisation," of an hereditary character to which any grant of land that was made was attached to the holder of the office as part of his remuneration, no right or custom of succession being shown to such land. Nor was there any proof that the land was impartible or in the nature of a Raj. Statements, it was contended, by various members of the family to the effect that the estate was impartible which had been relied upon by the High Court as being evidence, had been made after the controversy as to the existence of the custom arose, and were

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therefore inadmissible. The eldest son took a title which the younger sons did not take, but did not succeed as such to any land. The meaning of Paharaj was a unit over which the Chowdhuri exercised jurisdiction. Reference was made to Toynbee's History of Orissa, Ed. 1873 (printed at Bengal Secretariat Press), page 24; Account, Geographical, Statistical and Historical, of Orissa and Cuttack, by A. Stirling (reprint in Calcutta in 1904 of Ed. of 1822), page 2, paragraphs 6 and 7, and pages 65, 73 and 79; and Sir W. Hunter's Statistical Account of Bengal, Vol. 18, pages 129, 301. During the period of native rule, it was submitted on these authorities and on the evidence that no such custom, as was contended for by the respondent, had been shown to exist.

Since the commencement of British rule in Cuttack Regulations XI of 1793 and XII of 1805 precluded such a custom except in cases in which succession had devolved according to established usage to a single heir before and up to 1805, which came under Regulation X of 1800; and by section 36 of Regulation XII of 1805 the succession to estates was to be governed by the local law of the country which in this case was the ordinary Hindu law. It was pointed out that in all the cases in which the succession to the property in suit had been in dispute, the litigation had been settled by the younger sons obtaining, not the maintenance they would have been entitled to if the rule of primogeniture had existed and been adhered to, but shares of the estate much in excess of such maintenance, and these, it was submitted, were really shares of a joint estate under the Hindu law.

As to the proof required of such a custom *Ramalakshmi Ammal v. Sivanantha Perumal Sethurayar* (1) was referred to which laid down that a special usage modifying the ordinary Hindu law must be ancient and invariable, and established by clear and unambiguous evidence. Judged by these principles no such custom as was contended for had been proved, and the decree of the Subordinate Judge, which had been reversed by the High Court, should be restored.

Sir R. Finlay K.C. and *Kenworthy Brown*, for the respondents, contended that the custom of primogeniture was sufficiently established by the evidence. The land in dispute had for a long term of years been shown to have been attached to the office of Chowdhuri, and that office had been only held by one member of a family, namely, the eldest son. Reference was made to the answers given to certain questions addressed in 1814 to the Rajahs and Chiefs of the Regulation Provinces and Tributary Mahals as establishing the practice as to the succession to their estates (a book printed at the Military Orphan Asylum Press in Calcutta in 1861). The judgment of the High Court was supported for the reasons therein given, which, shortly stated, showed that in the only instance under native rule of which there was evidence regarding the succession, the descent was from father to eldest son, and that since the British occupation the claim of the eldest son to succeed had been invariably upheld in spite of the opposition of the younger sons; and that the law prescribed in the Regulations expressly allowed the rule of primogeniture to prevail in Cuttack in cases in which by established usage succession to an estate could be shown to have devolved to a single heir before 1805 (which it was submitted was the case here) and had not since been departed from. The right to partition had never been recognised.

As to the admissibility of the statements which the appellants argued were inadmissible: *Butler v. Mountgarrett* (1), *Monckton v. Attorney General* (2), and *In re the Berkeley Peerage* (3).

The contention that the family were not really proprietors of the land attached to the office of Chowdhuri, but that it was only remuneration to the holder of the office for the performance of the duties of Chowdhuri was a new one which had not been raised at any previous stage of the suit, and to which evidence had not been directed, and it should not be allowed to be taken for the first time on this appeal. The

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(1) (1859) 7 H. L. C. 632.

(2) (1831) 2 Russ. & M. 147, 161.

(3) (1811) 4 Camp. 401.

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passages cited from Stirling's Account of Orissa and Cuttack were not, it was submitted, applicable under the circumstances in evidence in the present case. Reference was made to the Cuttack Proclamation of 15th September 1804 (set out *in extenso* in Regulation XII of 1805), and the settlement registration made under it, and to *Freeman v. Fairlie* (1) and *Collector of Trichinopoly v. Lekkamani* (2).

As to proof of custom, *Mohesh Chunder Dhal v. Satrugan Dhal* (3) and *Nitr Pal Singh v. Jai Pal Singh* (4) were referred to.

De Gruyther K.C., in reply, referred to *Rajkishen Singh v. Ramjoy Surma Mazoomdar* (5) as to the probability of the succession to the estate in suit being regulated by the ordinary Hindu law; and to *Miller v. Madho Das* (6), and the Evidence Act (I of 1872), sections 21 and 32 clause (5) as to the admissibility of evidence. [*Sir R. Finlay K.C.*, on the latter point, referred to *Shahzadi Begam v. Secretary of State for India in Council* (7).]

The judgment of their Lordships was delivered by

March 11.

SIR ANDREW SCOBLE. The question for determination in this appeal is whether the succession to the estate to which it relates is governed by a family custom of succession by lineal primogeniture, or by the ordinary Hindu Law. The estate is considerable, the major portion of it being comprised in two mahals, named Killa Talmunda and Taluk Aranga, situated in the district of Balasore, in the Province of Orissa. The parties to the suit are members of the same family, the appellants representing a junior, and the respondent the senior, branch of it. The appellants were plaintiffs in the suit, in which they alleged that the family was an undivided family,

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| (1) (1828) 1 Moo. I. A. 305, 342, 343. | (5) (1872) I. L. R. 1 Calc. 186, 188. |
| (2) (1874) L. R. 1 I. A., 282, 313. | (6) (1896) I. L. R. 19 All. 76, 92; |
| (3) (1902) I. L. R. 29 Calc. 343; | L. R. 23 I. A. 106, 116. |
| L. R. 29 I. A. 62. | (7) (1907) I. L. R. 34 Calc. 1059, 1073; |
| (4) (1896) I. L. R. 19 All. 1, 14, 15; | L. R. 34 I. A. 194, 199. |
| L. R. 23 I. A. 147, 156. | |

governed by the Mitakshara School of Hindu law, and claimed partition of the family property under that law. The respondent, in his written statement, asserted that "according to the custom obtaining in our family from a very remote period, the eldest son of the eldest branch of the family becomes the *malik* of all properties, and his younger brothers are entitled to maintenance only without having any share in them." Upon the issue thus raised, the Subordinate Judge of Cuttack found in favour of the plaintiffs, but his decision was reversed on appeal by the High Court at Calcutta.

The family is a Brahmin family long established in Cuttack, members of which are proved to have held the office of Chowdhuri, under both the Mogul and the Mahratta rule. A great deal of information as to this office is to be found in an official Minute by Mr. Stirling (Secretary to the Commissioner) on Tenures in Orissa, dated 10th October 1821, to which their Lordships have been referred by counsel on both sides, and which appears to be a very carefully-drawn and reliable document. According to this Minute, under the government of the Gajpati native sovereigns, the country was divided for fiscal purposes into districts called Bissee and Khund, over each of which were placed two officers, one called Bissoee, or Khund-adipati (terms signifying chief of a division) and the other an accountant, called the Bhoee Mool. On the introduction of Todur Mull's revenue settlement, under the Mogul government, somewhere about A.D. 1580, Mr. Stirling says :—

"The titles of Khund-adipati and Bissoee became lost entirely in the more familiar designation of Chowdhuri (Chief) a word introduced from Bengal and Upper India, though, probably, not unknown before in the province, and the Bhoee Mool received the appellation of the canoongoe willaity (country or provincial canoongoe). The portion of the pergunnah under the more immediate charge of each was called talooka and the managers generally talookdars."

There does not appear to have been any change in the position of these officers under the Mahratta government, and Mr. Stirling came to the conclusion that there exists

"Ample ground for asserting the Mogul and the Mahratta talookdars, who formerly managed and collected the revenues of so considerable a

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proportion of the district with the designation of chowdhuris and canoongoes, were the hereditary revenue and police officers of the old Hindu government under another name."

The remuneration of these officers appears to have been an assignment of rent-free land called "nankar," and the right to certain perquisites or "russooms." As regards the ownership of land, Mr. Stirling observes :—

"The chowdhuri has been generally off-hand assumed to have been a proprietor of land, though the word is obviously only a title given to the head officers (or talookdars) of a pergunnah, and which in modern times has been adopted by the headman of nearly every hereditary art, profession, and bazar Nobody, I believe, ever supposed for a moment that the person called canoongoe by the Moguls was other than a mere servant of Government, though succeeding by regular inheritance to his office. . . . There is obviously no more reason to assume that the chowdhuri or chief of pergunnahs were the proprietors of the land comprised in them than that the canoongoe talookdars were—a conclusion from which most minds would probably revolt, however predisposed to see an absolute European landlord in every superior revenue manager connected hereditarily with the soil."

But as regards the offices held by both chowdhuris and canoongoes, Mr. Stirling goes on to say :—

"Their tenures were certainly generally heritable, though cases of removal were of frequent occurrence, and all the larger holders found it convenient to obtain a sunnud of appointment, or, say of confirmation, on succeeding to their inheritance. The very unscrupulous manner in which the right of ouster was exercised by the native rulers, as is obvious from the frequent occurrence of the word *tughueyyoor* (or change) in the sunnuds, might lead to a conclusion unfavourable to their acknowledged title to transmit hereditarily and furnishes, at all events, a strong ground of presumption that they were regarded as officers of trust, liable to be called to account for their conduct."

But, he concludes,

"It is my decided opinion that, from the hereditary character pervading so remarkably all the institutions of the Hindus, they at all times possessed an imperfect title of property in their offices, which was distinctly admitted and recognized by the practice of the Mogul government."

In the light of these general considerations, their Lordships have carefully examined the evidence produced by the respondent in support of his claim. It consists mainly of two ancient documents, as their Lordships are unable to attach much importance to admissions made in recent years by members of the family. The first of these documents is called an "Appeal of Gopinath Paharaj Chowdhuri to the Public for Testimony." The date is wanting, but it must have been written at some-

time between A.D. 1729 and 1745. It is addressed to all officials, ryots and cultivators of Sarkar Biro—which is presumably the talooka of the applicant—and recites that :—

“A Sanad of former ages of the time of the Emperor Jahangir bearing the seal of Rashid Beg Khan granting for salary 155 batis of land as nankar, subject to service as Chowdhuri of the aforesaid Sarkar, has become very old and owing to the paper being worm-eaten and worn out it was not capable of being preserved for future time; therefore, in 1137 Amli (A.D. 1729) it was shown to every gentleman, to men of respectability and all residents and amlas and functionaries of the said Sarkar.”

It was therefore requested that “those acquainted with the facts” will

“prove the document as well as the fact that the forefathers of this applicant from past ages discharged the duties of Chowdhuri of the said Sarkar in consideration of the nankar zamindari and that this applicant also keeps in attendance in the office of Thanadars and Amins and gets the revenue paid.”

It does not appear whether anybody complied with the request that he should “record his evidence on this paper”; but on the back is an endorsement: “155 batis of land under former Sanads assigned as nankar has been confirmed and granted to Chowdhuri Paharaj,” and particulars of the land are given.

The second document is a Sanad dated in A.D. 1745 and granted to the eldest son of the Gopinath just mentioned. It is addressed to the Mutsuddis and other functionaries of the mahals described in the Schedule and recites that :—

“The office of Chowdhuri under Sanads of former officials was for ages vested in (the ancestors of) Raghunath Paharaj. Now he has appeared before his Honour, and has made a representation, and his loyalty, truthfulness and his services have become disclosed. Therefore he is appointed as before to the office of Chowdhuri of the said mahals. It is required that you all will conduct all business of the said pergunnahs as before in consultation with him and by his advice . . . and you will leave to him all that is customary for the Chowdhuri and in respect of the nankar as was the practice before. The said Chowdhuri is required that he will not in the slightest degree omit to fulfil his duties loyally, and for the benefit of the Sarkar and for the welfare of ryots. He will appropriate the profits of the dastur and nankar lands as before and he will pay the proper rent of the jaghirdars under him year by year according to ancient usage, and he will make such endeavours as will make manifest his great loyalty and services daily, even more than before, then he will get his reward.”

On the back of the Sanad is an endorsement “Chowdhari's office confirmed in favour of Raghunath Paharaj Chowdhuri,”

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together with particulars of fifteen mahals, which do not correspond with those mentioned in Gopinath's documents, or those in dispute in this suit.

These documents have been recited at length because, as already observed, they form the only reliable evidence of the status of the family under successive native governments. In the opinion of their Lordships, they fall far short of establishing the claim of the respondent. They show, indeed, that the office of Chowdhuri was held, for many generations, by a member of the family, and that to the holder of that office certain lands were assigned as a part of his remuneration. But the grant was of an office only, and to an individual, to be held during good behaviour. It was clearly revocable at the pleasure of the sovereign, by whom it might be conferred, not merely on the eldest son, but upon any member of the family, or, indeed, on any body. In the nature of things, the office could only be held by one person at a time, and, as Mr. Stirling points out, such offices were "generally heritable"; but these considerations, though they may suggest a presumption, are not sufficient to establish a right. For this purpose, the evidence must be clear and unambiguous, which, in this case, it is not. Besides, it is hard to see how a family custom of succession to an estate not absolutely owned by the family could ever have existed.

So far, therefore, as relates to the period of native rule in Cuttack, the case of the respondents fails. It remains to enquire whether, after the British conquest, there was any recognition of the existence of such a custom, either by the family or by the Government.

The conquest of Cuttack took place in 1803, and by a Proclamation dated the 15th September 1804, the British Government declared its intention to adopt "such a plan for the settlement of the land revenue of the Province. . . . as may be most conducive to the prosperity of the country and to the happiness of the inhabitants." With this view, it was ordered that a settlement of the land revenue should be "concluded in all practicable cases with the zamindars, or

other actual proprietors of the soil (unless when disqualified by notoriously bad character or other good and sufficient cause) for the period of one year," on the expiration of which further settlements would be made "with the same persons (if willing to engage, and they shall have conducted themselves to the satisfaction of Government)" for further periods of three, four, and three years respectively at gradually enhanced rates. At the end of these eleven years, in 1822, a permanent settlement would be "concluded with the same persons (if willing to engage, and they have conducted themselves to the satisfaction of Government, and if no others who have a better claim shall come forward) for such lands as may be in a sufficiently improved state of cultivation to warrant the measure on such terms as Government shall deem fair and equitable."

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In the following year, Regulation XII of 1805 was passed, confirming and explaining this Proclamation, from sections 2 and 4 of which it appears that the first settlement was made with the persons in possession of the lands, and that the settlement extended to "the Mogulbundy territory of the Zillah of Cuttack," in which the lands now in suit are situated; and by s. 36 it was provided that "nothing herein contained shall be construed to authorize the division of the lands comprised in any estates in the Zillah of Cuttack, in which the succession to the entire estates devolves, according to established usage, to a single heir," in which cases Regulation X of 1800 was to apply, and the Courts were directed to give effect to "the local custom of the country." Generally, however, these newly-formed estates were declared to be descendible like other descriptions of property to all the heirs of the deceased proprietor, according to the Hindu or Mahomedan law of inheritance, as the case might be, and to be liable to partition when devolving on two or more heirs. Regulation XI of 1816, which exempts certain tributary estates in Cuttack from partition, does not appear to apply to the estate in question in this suit.

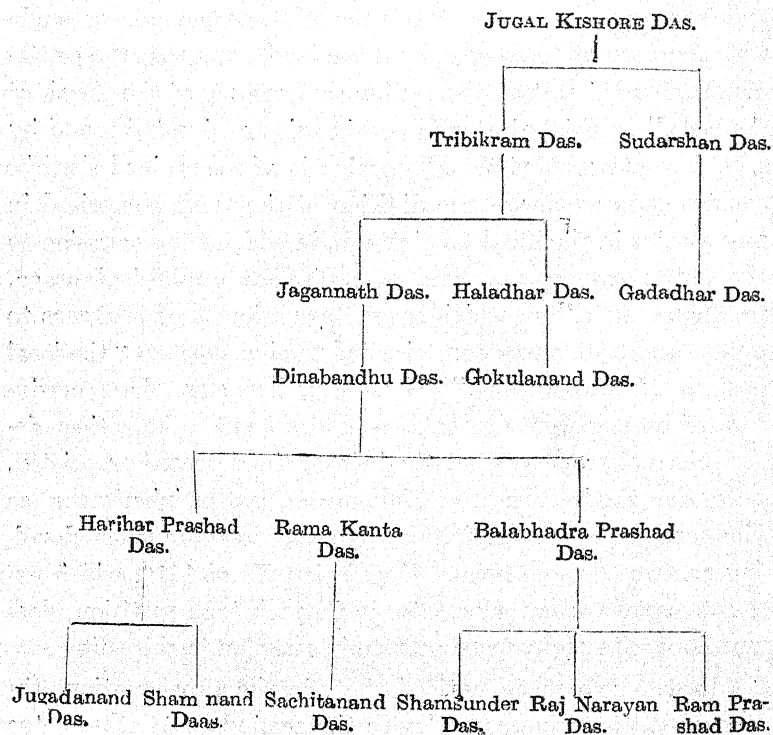
It will have been noticed that, in the Proclamation, the settlement is to be made "with the zemindars or other actual

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proprietors of the soil." In Mr. Toynbee's Sketch of the History of Orissa from 1803 to 1808 (p. 26) an explanation is given as to the persons included in the designation of zamindars :—

"During the confusion which ensued between 1801 and the British acquisition of the Province in 1803, it seems most probable that the *choudhuris canoongoes, mokadams*, and other persons entrusted with collections in estates held *khass*, or who had given agreements to the *amils* to pay the lump sums due from other lands, assumed the title of *zamindar*, and claimed to hold the land itself in virtue of hereditary right, valid or invalid, as the case may be, to collect its rents. Broadly speaking, therefore, the *zamindars* of Orissa were, at the time of the British acquisition, either principal *mokadams* with a hereditary right of collection, but without any right, title, or interest in the land itself; or Government officers, chiefly *choudhuris* and *canoongoes*, in charge of collection."

It now becomes necessary to trace the history of the family and their estate after the advent of the British Government, and this history will be more easily understood by reference to the subjoined pedigree :—



From their pedigree it appears that Jugal Kishore left two sons, Tribikram and Sudarshan, the elder of whom, Tribikram, entered into successive engagements with the British Government from 1805 to 1818, when he died. The second of these engagements, for three years from 1805 to 1808, is printed in the Record, and is dated 29th July 1805. It is addressed to the ryots, cultivators, mokadams, and sarbarakars of Killa Talmunda, and recites that Bir Bikram Paharaj, according to usual custom, and in consideration of good services rendered by him in 1804, and also in consideration of the fact that he had "signed the settlement decision for 1213 to 1215 Amli for an annual jumma of Rs. 1,154. 13. 5 . . . and duly submitted the kabuliyat and kistbundi in this Court, is confirmed." No inference can be drawn from this document, which is in common form, and is limited, as might be expected, to the grantee's liability for the revenue demand.

Tribikram died in 1818, and by an order of the Collector of the District, dated 11th March 1818, "the zamindari was recorded in the name of Chowdhuri Jagannath Das, son of the deceased, and the revenue was realized from him by the Government." Thereupon, Tribikram's younger brother, Sudarshan, filed a suit claiming "a half share of the zamindaris belonging to the estate" of his grandfather and father, and a half share of the cash and value of movable properties belonging to the estate of his father. This suit was compromised upon terms which secured to the claimant far more than the maintenance allowance to which he would have been entitled had the succession to the estate been governed by the rule of lineal primogeniture, and which further bound his nephew and his heirs neither to sell nor in any way to hypothecate the zamindaris without the consent of the younger branch of the family. This condition, however, soon seems to have been broken, for it appears from Government records that in 1837, one Gobardhan Das purchased a half share in the zamindari at an auction sale; and that subsequently Haladhar Das, the younger brother of Jagannath Das, brought a civil suit in respect of the other half share and obtained a decree, "and thereafter

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he, the said (Haladhar) Das, of his own accord, gave out of the same a four annas share to Chowdhuri Jagannath Das, and made a petition for the remaining four annas share being recorded in his own name." This was accordingly done, and the zamindari was entered in the Government records as the zamindari of Chowdhuri Jagannath Das Paharaj and Haladhar Das and Gobardhan Das by an order dated 27th July 1842. It should be noted here that Haladar, as a matter of fact, brought two suits, one for a half share of Killa Talmunda and the other for a half share of Taluk Aranga, and obtained *ex parte* decrees in both suits, in the absence of his brother from the district ; but a final agreement was made, on his brother's return, in which it is admitted that "there is no practice in the family about partition on account of a brother's share" and Haladhar, as the result of the litigation, merely obtained a four annas share in the Zamindari of Killa Talmunda "on account of his maintenance allowance," and relinquished his claim to any share in Taluk Aranga, and all other movable and immovable properties possessed by the defendant, and to the costs of the suit.

Jagannath died in 1862, leaving an only son Dinabandhu, so that in this instance no question of primogeniture could arise. Dinabandhu died in 1871, leaving three sons, one by his first wife, named Harihar, and two by his second wife, named Rama Kanta and Balabhadra, the present appellants, both of whom were minors at the time of their father's death. Harihar's name was entered on the Revenue Registers without objection ; and on his death in 1885, his widow Saraswati Debi applied for registration of her name as mother and next friend of her infant son Jugadanand. The present appellants objected on the ground of their being joint owners of ancestral property, in answer to which the applicant asserted that the law of primogeniture applied to the family. The Revenue Court declined to go into the question and decided the case upon a technical ground, referring the parties to the Civil Court for the determination of the question of custom. This suit was thereupon brought. The Subordinate Judge found that the

custom was not proved. The High Court held it established that "the rule of primogeniture has uninterruptedly governed the devolution of property in the family for a long period of time both before and after the British occupation."

Their Lordships have already stated their reasons for holding that no family custom, properly so-called, existed during the period of native rule. As regards the subsequent period it is clear that, whenever the holder of the estate died leaving more than one son, the right of the eldest son was challenged in the Courts, and the litigation invariably ended in a compromise under which the younger sons obtained a share of the estate very much in excess of the maintenance to which, had the custom existed, they would have been entitled. The evidence entirely fails, in their Lordships' opinion, to give to the alleged custom the character of certainty which is essential to its validity; and this being so, it seems to their Lordships that the decision of the High Court cannot be supported, and they will humbly advise His Majesty to reverse that decision and in lieu thereof to direct that the decree of the Subordinate Judge be confirmed and the appeal to the High Court dismissed with costs.

The appellants must also have their costs of this appeal.

Appeal allowed.

Solicitors for the appellants: *Sanderson & Co.*

Solicitors for the respondent: *T. L. Wilson & Co.*

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APPELLATE CIVIL.

Before Hon'ble Mr. R. F. Rampini, Acting Chief Justice, and Mr. Justice Ryees.

1908

June 1.

MANINDRA CHANDRA NANDI

v.

UPENDRA CHANDRA HAZRA.*

Lease—Bengal Tenancy Act (VIII of 1885), s. 29—Leases in contravention of s. 29 of the Bengal Tenancy Act—Effect of payment of rent for a number of years—Onus of proving increase of area.

Leases executed in contravention of the provisions of section 29 of the Bengal Tenancy Act are void and not voidable, though rent has been paid under them for a number of years.

Probat Chandra Gangapadhyay v. Chirag Ali (1) referred to.

A contract of such a nature is not legal or operative to the extent of the enhancement allowed by the rent law.

Kristodhone Ghose v. Brojo Gobindo Roy (2) referred to.

When it is shown what the previous rent of the tenant defendant was, it is for the plaintiff to justify the enhancement of rent claimed, which is obviously in excess of the enhancement allowed by the Act.

SECOND APPEAL by Manindra Chandra Nandi (Maharaja of Cossimbazar) the plaintiff.

In the year 1297 B.S. Maharani Sarnamayee, the predecessor-in-interest of the present Maharaja of Cossimbazar, the plaintiff in these suits, purchased the *patni* interest in *mahal* Beldanga, thereby causing the *patni* to merge once more into the parent zemindari. Previous to that year, the *patni* had changed hands somewhat frequently. Considerable trouble between zemindar and tenants followed the Maharani's purchase of the *mahal*, disputes arising in connection with rates of rent, *khas khamar* lands of the zemindar, and other kindred questions. Matters came to such a pass that the District Magistrate was forced to intervene, and rents were subsequently

* Appeals from Appellate Decrees, Nos. 2388 and 2466 of 1906, against the decrees of A. W. Watson, Offg. District Judge of Murshidabad, dated Sept. 12, 1906, reversing the decrees of Tarapada Chatterjee, Munsif of Berhampore, dated June 5, 1906.

(1) (1906) I. L. R. 33 Calc. 607.

(2) (1897) I. L. R. 24 Calc. 895.

settled to which the principal tenants agreed. The amount of land held by the various tenants was ascertained by survey, rental payable thereon were assessed by the zemindar, and finally some 2,000 tenants executed *kabuliats* which bound them to pay rent at the rates thus determined. After the execution of these *kabuliats* whose execution had been preceded by the acceptance by the *rai-yats* of *amanati* receipts, and by their signing *fardis* which showed the amount of, and the rates assessed upon, the lands held by them, rent appears to have been paid at the *kabuliat* rate for some years. But within two or three years previous to the institution of the suits, troubles again arose between the present landlord and his tenants, the tenants having ceased to pay rent, and applied to Government for a record-of-right. The Maharaja instituted these suits to realise rent on the basis of the *kabuliats* admittedly executed by them, alleging that these agreements were entered into by the tenants by way of settlement of disputes which had been up till then raging in the *mahal* between the plaintiff's predecessors and the *rai-yats*, and with a view to render certain the amount of rent which each tenant was to pay in the future, and to avoid litigation. In short, the plaintiff alleged that there was a mere re-adjustment, but no enhancement of rent, and that therefore the claim must succeed.

The defendant contended, *inter alia*, that the *kabuliats* were executed by him under threat of oppression and duress, and that they were invalid under section 29 of the Bengal Tenancy Act.

The Munsif decreed the suits. On appeal, the decision of the Munsif was reversed. The plaintiff thereupon preferred these second appeals.

Dr. Rash Behary Ghose (Babu Pramatha Nath Sen and Babu Hemendra Nath Sen with him), for the appellant. The lease in question was the result of a settlement of disputes between the landlord and tenants in respect of rent and area. The so called enhancement was really the price of the compromise and for the privilege of transferability conferred. I could have ejected him. The agreement was not void, but only

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voidable. There was acquiescence for over 12 years, and he cannot question it now. The covenant is severable and I am entitled to enhancement up to 2 annas in the rupee: *Sheo Sahoy Panday v. Ram Rachia Roy* (1). The later cases are not based on sound principle.

The Advocate General (Hon'ble Mr. Sinha) and Babu Nalini-ranjan Chatterjee, for the respondent. The law on this point is settled: *Kristodhone Ghose v. Brojo Gobindo Roy* (2), *Mothura Mohun Lahiri v. Mati Sarkar* (3) and *Probat Chandra Ganga-padhyā v. Chirag Ali* (4).

Dr. Rash Behary Ghose, in reply.

Cur. adv. vult.

RAMPINI A.C.J. AND RYVES J. The two second appeals, No. 2388 and 2466, of 1906 are appeals against a decision of the District Judge of Murshidabad in suits for arrears of rent. The defendant is sued on the basis of two *kabuliats* executed by him in favour of the plaintiff on the 18th October 1894, which he now repudiates on the grounds (i) that they were obtained from him by oppression and threats, and (ii) that they are illegal, being contrary to the provisions of section 29 of the Bengal Tenancy Act.

Both the lower Courts have found that the *kabuliats* were not extorted from the defendant by oppression or threats, but were executed voluntarily by him. But the lower Appellate Court has held that the *kabuliats* are void, being contrary to the provisions of section 29 of Act VIII of 1885. It has been further held that the fact that the defendant has paid rent at the rate mentioned in the *kabuliats* for some time is immaterial, and that a decree which the plaintiff obtained against the defendant for the rent, which is the subject of dispute in the suit to which appeal No. 2466 relates, does not make the question of the rate of rent payable *res judicata*.

The plaintiff now appeals. On his behalf it has been urged (i) that the *kabuliats* are legal, being executed in settle-

(1) (1891) I. L. R. 18 Calc. 333.

(3) (1898) I. L. R. 25 Calc. 781.

(2) (1897) I. L. R. 24 Calc. 895.

(4) (1906) I. L. R. 33 Calc. 607.

ment of disputes which arose between the landlord and the defendant both as to the amount of rent payable and the area of the defendant's holdings ; (ii) that the enhancement agreed to in the *kabuliats* is only the price of the privilege of transferring holdings without the consent of the landlord conferred by the leases ; (iii) that the leases are not void, but voidable, and that as the defendant has paid the rents stipulated for in them for many years without objection, he cannot now question them ; (iv) that the leases are at least good to the extent of the enhancement allowed by section 29 of the Act ; and (v) that the onus of proving that the plaintiff is entitled to additional rent for additional land has been wrongly thrown on the plaintiff. In appeal No. 2464, there is a further plea that the decree obtained by the plaintiff against the defendant on the 16th January 1905 has the effect of *res judicata*.

It appears to us that the appeals must fail on the findings of fact arrived at by the District Judge. He has found that the rent payable by the defendant prior to the execution of the *kabuliats* was Rs. 32 and that it now amounts to Rs. 63, and that consequently the *kabuliats* contravene the provisions of section 29 of the Act. He has further found that the defendant is now not in possession of more land than he originally held, so that the enhancement of rent cannot be justified under section 52, and finally, he has held that there was no dispute between the plaintiff and the defendant as to the rent and area of the defendant's holdings in settlement of which the *kabuliats* were executed.

It may be here explained that the provisions of section 29 of the Tenancy Act have always been obnoxious to the landlords of Bengal. Soon after the passing of Act VIII of 1885, they endeavoured to evade them by entering into compromises with their tenants. The ruling of this Court in the case of *Sheo Sahoy Panday v. Ram Rachia Roy* (1) gave some countenance to this practice to which recent legislation in Act I of 1907 (B.C.) is intended to put an end. But, however, all this may be, the application of the ruling in *Sheo Sahoy*

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Panday v. Ram Rachia Roy (1) followed in *Nath Singh v. Damri Singh* (2) to these cases is negatived by the finding of fact of the District Judge that there was no dispute between the plaintiff and the defendant, which the execution of the *kabuliats* now sued on, was intended to settle. That being so, they must be illegal and cannot be given effect to.

The plea taken by the learned pleader for the appellant that the illegal enhancement of rent agreed to in the *kabuliats* was but the price of the privilege of transferability of the holdings conveyed by the leases cannot prevail, because (i) this plea was never raised in either of the lower Courts, (ii) it is not shown that the holdings were non-transferable before the execution of the *kabuliats*, and (iii) it is not shown that there was any dispute between the parties as to the transferability of the holdings in settlement of which the *kabuliats* were executed.

It has been clearly held that the leases executed in contravention of the provisions of section 29 of the Act are void, not voidable: *Probat Chandra Gangapadhya v. Chirag Ali* (3). Rent has been paid under them in one case for about 11 years, but this does not make legal and operative an illegal and void contract.

It has also been held that a contract which is illegal and void as being contrary to the provisions of section 29 of the Act is not legal and operative to the extent of the enhancement allowed by the rent law: *Kristodhone Ghose v. Brojo Gobindo Roy* (4).

The onus of proving that the area of the land has not increased, has not, in our opinion, been improperly thrown on the plaintiff. We agree with the lower Court that when it is shown what the defendant's previous rent was, it is for the plaintiff to justify the enhancement of rent now claimed, which is obviously in excess of the enhancement allowed by the Act.

We have carefully examined the *ex parte* decree relied on by the plaintiff in appeal No. 2466. It is merely a decree for a

(1) (1891) I. L. R. 18 Calc. 333.

(2) (1900) I. L. R. 28 Calc. 90.

(3) (1906) I. L. R. 33 Calc. 607.

(4) (1897) I. L. R. 24 Calc. 895.

certain sum of money claimed for a certain period. It decides no question of the rate of rent payable by the defendant. It, therefore, has not the effect of *res judicata*.

We accordingly dismiss these appeals with costs.

Appeals dismissed.

S. M.

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ORIGINAL CIVIL.

Before Mr. Justice Harington.

ATUL CHUNDER GHOSE

v.

LAKSHMAN CHUNDER SEN.*

1909
Feb. 23.

Attorney and Client—Attorney's Retainer, how revocable—Civil Procedure Code (Act XIV of 1882), ss. 2, 39—Continuance of Authority of Attorney—Bill of Costs—Cause of Action, accrual of—Limitation.

An attorney's retainer cannot be revoked by his client by a mere letter: it can be revoked only with the leave of the Court by a writing signed by the client and filed in Court, as provided in section 39 of the Code of Civil Procedure of 1882.

In the case of an attorney's costs, the cause of action arises when the work for which he was retained is completed and limitation begins to run from that time.

Coburn v. Colledge (1) followed.

Where the decree in the suit for which the attorney was retained, directed that the client should personally pay to other parties certain costs to be taxed:—

Held, that the attorney's authority continued after judgment and covered the taxation of these costs, and the retainer was not at an end until the issue of the *allocatur*.

Lady de la Pole v. Dick (2) referred to.

ORIGINAL SUIT.

THIS suit was instituted by an attorney for the recovery of the sum of Rs. 4,588-8 being the amount of his bill of costs remaining unpaid.

On the 18th December 1901, the plaintiff, Atul Chunder Ghose, was retained by certain members of the Sen family, Lakshman Chunder Sen, Gocool Chunder Sen, Gopal Chunder

* Original Civil Suit No. 616 of 1908.

(1) [1897] 1 Q. B. 702.

(2) (1885) 29 Ch. D. 351.

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Sen, Brindaban Chunder Sen and Sreemutty Moonjari Dassee, in respect of a certain family suit being suit No. 882 of 1896 in which they were defendants. He was subsequently retained by other members of the family, having similar interests as party-defendants. The warrants of attorney executed by all the defendants were duly filed in Court.

It was alleged by the plaintiff, Atul Chunder Ghose, that he acted as the attorney of these parties in suit No. 882 of 1896, and in the appeal therefrom being appeal No. 29 of 1903, and that on the final taxation of his costs on the 16th September 1907, the aggregate sum of Rs. 7,727-8 was allowed him as between attorney and client. Various sums were received by the plaintiff from time to time on general account, aggregating to Rs. 3,139. This suit was instituted for the balance, against the clients, who had retained the plaintiff as their attorney, and the representatives of two of them who had died in the meanwhile. The plaint was filed on the 4th July 1908.

This claim was contested by only one of the defendants, Gocool Chunder Sen, who alleged that on the 13th January 1903, before the hearing of the suit in the Court of first instance, he had revoked the authority he had given to the attorney. It appears that on the 13th January 1903 he wrote to the attorney as follows: "I regret to advise you that as my circumstances do not allow me at present to bear the expenses necessary to conduct the above case, please take notice that you need not act any more on my behalf in this case." The attorney replied on the same date: "Now that the joint written statement has been filed and counsel have been instructed, I am sorry I do not find how I can accede to your request. You better arrange matters between yourselves." In reply to this Gocool wrote on the 21st January 1903: "I have to say that my letter of the 13th idem cancelled the authority I gave you to act on my behalf for conducting the above suit, consequently I am in no way responsible for any costs whatsoever and counsel's fee regarding the above suit from that date." On the same date the attorney replied: "I do not think you can cancel the authority at your pleasure without paying my costs, and so long as I am the attorney on

record I do not know if I will be justified in refusing to act for you." Gocool submitted that he was not liable for the costs incurred since the 13th January 1903, and that the claim for costs arising before that date, was barred by limitation.

It appears that the decree in appeal No. 29 of 1903 directed that certain parties, amongst others Gocool Chunder Sen, should personally pay to the appellants certain costs of the appeal to be taxed on scale No. 2, and that the *allocatur* in connection with the taxation of those costs was issued on the 6th July 1905. It further appears there were divers items in the attorney's bill of costs principally relating to the taxation of the costs in the suit and appeal, under date within three years previous to the date of the filing of the plaint in the present suit. It was established in evidence that Gocool gave instructions to the plaintiff, subsequent to the letter of withdrawal.

Mr. C. C. Ghose, for the defendant. This suit is not maintainable. The retainer giving authority to the plaintiff to act as defendant's attorney was expressly revoked by letter on the 13th January 1903, and the defendant never at any subsequent date authorised the plaintiff to act for him in that capacity. The revocation of the 13th January 1903, effectually discharged the plaintiff from acting as defendant's attorney. Secondly, assuming the authority to continue, the claim was barred by limitation. The plaint in this suit was filed on the 4th July 1908. The items in the bill subsequent to the 4th July 1905 relate to the taxation of costs. This does not save limitation. It is the judgment that determines the *lis*.

Mr. A. N. Chaudhuri, for the plaintiff. The letter of the 13th January 1903 was not sufficient to revoke the attorney's authority. The attorney's retainer can be revoked only with the leave of the Court by a writing signed by the client and filed in Court: see the Code of Civil Procedure (old Code, section 39, new Code, O. 3, r. 4), Belchamber's Rules and Orders, rule 136, Cordery's Law of Solicitors, 3rd edition, page 103. The reason for this is to protect attorneys, who are bound to act for their clients, unless discharged by their clients, even without payment of costs: see *Basanta Kumar*

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Mitter v. Kusum Kumar Mitter (1). On the second defence raised it is submitted that the *lis* cannot be considered determined by the judgment: see *Lady de la Pole v. Dick* (2). There might be a considerable amount of work to be done by the attorney in connection with settling the decree and taking steps in execution. The attorney's retainer covered the taxation of costs and hence this suit was not time-barred.

Cur. adv. v

HARINGTON J. This is an action by an attorney to recover his bill of costs. The retainer was given by a number of members of the Sen family. The present defendants are either persons who gave, or the representatives of the person who gave the retainer.

Only one defendant appears to contest the plaintiff's claim. He does not deny the retainer and the doing of the work, but says that on January 13th, 1903, he revoked the authority given to the attorney, and that he is, therefore, not liable for costs incurred since that date. The claim for costs arising before that date is, he says, barred by limitation. The retainer was given on December 18th, 1901, by Gopal Chunder Sen, Brindabun Chunder Sen, Gocool Chunder Sen and Sreemutty Moonjari Dasse, and the plaintiff acted as attorney for these parties at the hearing before the Court of first instance and in the Court of Appeal.

On January 13th, 1903, the defendant Gocool wrote to the plaintiff to the effect that his circumstances did not allow him to bear the expenses necessary to the conduct of the case and giving him notice not to act further on his behalf.

The attorney replied saying that as the joint written statement had been filed and counsel had been instructed he could not accede to the request in the letter. He recommended the defendant to settle matters with his co-defendants.

In reply the defendant wrote saying that his letter of the 13th cancelled the authority to act, and that he was in no way responsible for costs or counsel's fees from that date.

(1) (1900) 4 C. W. N. 767.

(2) (1885) L. R. 29 Ch. D. 351.

To this the plaintiff replied "I do not think you can cancel the authority at your pleasure, and as long as I am attorney on the record I do not know if I will be justified in refusing to act for you."

To this letter the defendant made no reply.

As to what happened after this, there was a dispute in fact. The plaintiff said that during the hearing the defendant Gocool was present and gave him instructions and that he attended at his office on May 13th, 1903. The last piece of evidence was corroborated by an entry in his Day-Book.

This the defendant met with a flat denial. He said he never instructed the plaintiff after January 13th that he never went to his office after that date, and while he admitted that he was in Court from time to time during the progress of the trial, he swore he never gave any instructions to the attorney while in Court.

As to this I believe the plaintiff, because his evidence is supported by an entry in his Day-Book the genuineness of which I see no reason to doubt. I find in fact, therefore, that the defendant did attend the attorney in his office as his client at a date subsequent to his letter purporting to withdraw his authority.

The first question to be considered is as to whether the letters of January 13th, to which I have referred, were effective to discharge the plaintiff from acting as the defendant's attorney.

By Act No. 2, section 39, read with section 2, "the appointment of an attorney must be in writing and must be filed in Court. When filed it is to be considered in force until revoked by the order of the Court by a writing signed by the client and the Court."

In this case the provision of the law has not been complied with. The plaintiff is not empowered to discharge the attorney and leave it open to the defendant to go on with the litigation in person. In my opinion the attorney's authority is not revoked, because the defendant has not complied with the provisions of section 39 of Act No. 2.

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Next, assuming the authority to continue, is the claim barred by limitation? The plaintiff's cause of action arose when the work for which he was retained was completed: see *Coburn v. Colledge* (1).

The plaint in the present suit was filed on July 4th, 1908. It is necessary, therefore, for the plaintiff to show that some work was done under the retainer given by the defendants since July 4th, 1905.

In the bill there are divers items under date later than that date principally relating to the taxation of the costs in the suit and appeal in which the attorney had acted. This, it is argued, does not bring the case out of the statute. I think it does—it is work done for the client under the retainer originally given to the solicitor.

The case of *Lady de la Pole v. Dick* (2) is an authority for the proposition that the authority of the attorney may continue after judgment.

In the present case, I think in fact the attorney's authority did continue after judgment and covered the taxation of costs, because the decree directs that certain parties, amongst others Gocool, shall personally pay to the appellants 6-12ths of the costs of the appeal to be taxed on scale No. 2. Until taxation, therefore, the amount payable by the client under the decree could not be ascertained. The solicitor's retainer, therefore, covered the taxation of these costs which took place early in July 1905, and was not at an end until the issue of the *allocatur* on the 6th of that month. Until the *allocatur* issued, the amount payable by the client was not ascertained and the work was, therefore, not completed.

For these reasons, I hold that the plaintiff is entitled to recover, and judgment must be given in his favour for the amount claimed, with costs on scale No. 2.

Judgment for plaintiff.

Attorney for plaintiff: *R. L. Mukerjee.*

Attorney for defendant: *S. C. Mitter.*

APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and
Mr. Justice Brett.

MOHINI MOHAN ADHIKARY

v.

KASHINATH ROY CHOWDHRY.*

1909

Feb. 25.

Easement—Musical Festival.

No easement to hold something in the nature of a musical festival on a plot of ground can properly exist.

SECOND APPEAL by the defendants, Mohini Mohan Adhikary and others.

Appeal No. 2483 related to rights of easement claimed in a plot of land by Radha Kanta Thakurjee and others, *shebait*s of the *Thakurs* Radhaballav and Radhakanta, against Mohini Mohan Adhikary and others, *shebait*s of another *Thakur* Gopinath. The rights claimed were: (i) the right of holding *kirtan* (holy music) over the entire land at a certain festival of their *Thakurs*, and (ii) the right of taking their *Thakurs* across this land from the *dole-mancha* to a certain pathway at certain festivals.

The defendants contended, *inter alia*, that the right of holding *kirtan* cannot be claimed as a right of easement.

The Munsif decreed the suit. On appeal, the Subordinate Judge modified the decree of the Munsif but upheld the Munsif's decision on the point of easement. The defendants, thereupon, preferred this second appeal.

Babu Dwarka Nath Chakravarti (*Babu Brajendra Nath Chatterjee* with him), for the appellants. There cannot be an easement of this nature. Which is the *servient* tenement and which the *dominant* one? Who is to benefit by this user?

* Appeal from Appellate Decree, No. 2483 of 1906, against the decree of *Sripati Chatterjee*, Subordinate Judge of Hooghly, dated July 23, 1906, affirming the decree of *Kali Kumar Sarkar*, Munsif of Arambagh, dated March 31, 1905.

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What is the origin of the right claimed? Assuming there was a custom, the custom must be reasonable: Gale on Easements, 8th Ed., p. 3: *Kuar Sen v. Mamman* (1).

Babu Baidya Nath Datta (Babu Atulya Charan Bose, Babu Ram Chandra Majumdar and Babu Beer Chandra Dutt with him), for the respondents. It was a user from time immemorial. The Court was justified in inferring grant. The case (1) cited by the appellants is in my favour.

MACLEAN C.J. As regards this appeal, two questions arise: *first*, whether there was an easement acquired by the plaintiffs in this suit to hold something in the nature of a musical festival once or twice a year on the plot of ground which is the subject of dispute; and, *secondly*, whether the plaintiffs acquired a right of way to carry their idols over this piece of land. As regards the first point, I think no such easement can properly exist: it cannot exist as an easement. There may have been a custom—a custom entitling them to hold a “*kirtan*,” a sort of religious concert on the piece of land. But that is not the case set up. We do not think there can properly be what is known as an easement, such as the plaintiffs claim. This appeal, therefore, succeeds on this point. As regards the other question, the Court below seems to have thought that it was established that the plaintiffs had been exercising a right of way over the plot of ground for the purpose of carrying idols one or two days a year. But there does not seem to be any particular track: the people carrying the idols sometimes along one track and sometimes another: but always across this strip of ground. The lower Court has given the defendants an opportunity of showing in execution proceedings that there is a definite track, or to have a definite track marked out, which the plaintiffs must follow for the purpose of carrying idols. That is in favour of the defendants. I think the Court below was right and we cannot interfere. The result is that so much of the decree of the Court below as deals with the question of easement, that is to say, the right

to hold the musical entertainments must be reversed, but it stands as to the right of way. As each party has succeeded partially in this appeal, there will be no costs.

BRETT J. I agree.

Decree modified.

S. M.

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APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Brett and Mr. Justice Fletcher.

COOVERJEE BHOJA*

v.

RAJENDRA NATH MUKERJEE.

1909
March 10.

Damages, measure of—Contract for forward monthly Deliveries—Construction of Contract—Breach before the time for complete Performance—Market Rate, where no Market in India, how to be determined.

The defendant contracted to sell to the plaintiffs 5,000 tons of manganese ore of a certain quality to be delivered into waggons at Kamptee, B.-N. Ry., "500 tons in October, 1,000 tons in November, 1,500 tons in December 1906, or larger quantities each month if practicable, the whole 5,000 tons to be completed not later than 15th February 1907." In October 1906 the defendant tendered in part fulfilment of the contract certain Domree ore which the plaintiffs refused to accept, on the ground of inferiority in quality. Thereupon the defendant on the 5th November 1906 wrote cancelling the contract, and on the 17th January 1907 finally repudiated all liability under the contract. On the 5th March 1907, the plaintiffs instituted an action for damages for non-delivery. It was established in evidence that ordinarily there was no market rate for manganese ore in India, but that there was a free market in England, and that the plaintiffs intended to ship the ore to England :—

Held, that the contract constituted a set of distinct contracts, and the proper measure of damages was the sum of the differences between the contract and market price of the several quantities at the several periods for delivery, even though the defendant repudiated the contract at a period previous to the final date specified in the contract.

Josling v. Irvine (1), *Brown v. Muller* (2), *Roper v. Johnson* (3), followed.

Inasmuch as there was no market rate for the commodity in Calcutta at the date of the breaches, the damages for those breaches was the value to

* Appeal from Original Civil, No. 5 of 1908.

(1) (1861) 6 H. & N. 512.

(2) (1872) L. R. 7 Ex. 319.

(3) (1873) L. R. 8 C. P. 167.

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the plaintiffs of the portions that ought to have been delivered on those dates at the prices procurable in England less the cost of getting them there.

Borries v. Hutchinson (1) followed.

APPEAL by the defendant, Cooverjee Bhoja, from the judgment of Harington J.

By a contract dated the 22nd August 1906, Messrs. Martin & Co., of which firm the respondent, Rajendra Nath Mukerjee, was a member, purchased through Messrs. Buskin & Co., brokers, from Cooverjee Bhoja 5,000 tons of manganese ore at Rs. 14 per ton to be delivered into waggons at Kamptee or other neighbouring station, Bengal-Nagpur Railway, 500 tons in October, 1,000 tons in November, 1,500 tons in December, or larger quantities each month if practicable, the whole 5,000 tons to be completed not later than the 15th February 1907. It was agreed that the quality of the ore should be similar to that shown in two analyses already taken, copies whereof were attached to the bought note. The percentages of some of the component parts in these analyses were, in the one, manganese 59·66, phosphoric acid ·1, silic matter 6·94, and in the other, manganese 57·05, phosphoric acid ·14 and silic matter 5·97. It appears no such copies of the analyses were attached to the sold note; the vendor, however, had the original analyses in his possession, and had given copies to the brokers.

It was further provided that the buyers or their representatives were to sample and analyse each parcel at the place of delivery, and such quantity only as might be approved by the buyers was to be despatched; and should the ore be found on analysis to contain less than 50 per cent. of manganese, the seller agreed to give an allowance of 6 annas per unit for the inferiority, payment to be made in Calcutta on delivery of railway receipts. It was alleged by Messrs. Martin & Co. that they insisted on the introduction into the contract of the provisions as to the quality of the ore, as to the approval of the buyers and the grant of allowance, in order to ensure the supply of ore suitable to meet a contract containing like provisions as to quality, to be made in England by the Indian Manganese

Company, whose agents they were, and that Cooverjee Bhoja was aware that the ore covered by the contract with him was to be supplied to meet such a contract.

It appears that during the first three weeks of October certain correspondence passed between Messrs. Martin & Co. and Cooverjee Bhoja, in the course of which the former made frequent and repeated complaints to the latter as to the non-delivery of any of the ore under the contract. On the 25th October, Mr. Hance, who had been deputed by the purchasers to sample and analyse the ore and had proceeded to Kamptee for the purpose, wrote to the vendor that he could not accept any of the Domree ore then at Kamptee. On the 29th October the vendor replied, observing "I have nothing but Domree ore to offer you, and as you have given me distinctly to understand that you cannot accept any of my ores from this mine in completion of the above contract, please note that if you do not forthwith take delivery of the Domree ore that is now lying at Kamptee station and which I tender under the above contract, I will consider the contract cancelled." This letter was replied to on the 1st November by Messrs. Morgan & Co., solicitors of the purchasers, stating that the ore tendered was of an inferior quality and not of the analysis contemplated by the contract, and threatening proceedings. On the 5th November, Cooverjee Bhoja replied, stating "the ore which I offered to your clients is of the quality contemplated for delivery under the above contract. As your clients have refused to accept this ore and have not taken delivery of the same in terms of contract, I have instructed my seller not to despatch any more ore to the Kamptee station on my account, and I must, therefore, give your clients notice through you that I hereby cancel the contract with them."

This action was accordingly instituted on the 5th March 1907 by the purchasers against the vendor for the sum of Rs. 35,000 as damages for non-delivery of the manganese ore, on the basis of the difference between the contract rate and the market rate on the 17th January 1907, when, it was alleged by the plaintiffs, the defendant finally repudiated his liability to deliver under the contract.

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The pleas raised in defence were : *first*, that there was no concluded contract between the parties, by reason of the fact that copies of the analyses were not attached to the sold note ; *secondly*, that the tender of the Domree ore was a good tender within the meaning of the contract and that the plaintiffs wrongfully refused to accept the said ore ; *thirdly*, that the plaintiffs were not entitled to recover differences as on the 17th January 1907.

It was established in evidence that the Domree ore which was tendered by the defendant showed on analysis a percentage of 39·68 of manganese, and that Domree ore was unmarketable in India. It was admitted that there was a free market for manganese ore in England, and that the plaintiffs intended to ship the ore to England.

On the 20th December 1907, Harington J. gave judgment for the plaintiffs, allowing them the sum of Rs. 25,000 as damages, being the difference between the contract price and the nearest market price.

From this judgment the defendant appealed.

Mr. Garth and Mr. Pugh, for the appellant.

Mr. Dunne, Mr. J. E. Bagram and Mr. J. Chatterjee, for the respondent.

Cur. adv. vult.

MACLEAN C.J. This is a suit by the buyers to recover damages against the seller for breach of contract for non-delivery of certain manganese ore. The contract was entered into through a firm of brokers, Messrs. Buskin & Co., and is in the following terms :—

“ Calcutta :

“ Messrs. Martin & Co.

32nd August 1906.

Dear Sirs,

We have this day bought by your order and on your account from Messrs. Cooverjee Bhoja, 19, Pollock Street,

The following manganese ore 5,000 tons at Rs. 14 per ton in waggons.

The ore to be delivered at Kamptee or other neighbouring station, B.-N. Railway, 500 tons in October, 1,000 tons in November, 1,500 tons in December 1906, or larger quantities each month if practicable, the whole 5,000 tons to be completed not later than the 15th February 1907.

Quality of ore to be similar to that shown by the analyses already taken, copies of which are hereto attached.

Buyers or other representatives to sample and analyse each parcel at place of delivery and such quantity only as may be approved by buyers to be despatched. Should the ore be found on analysis to contain less than (50 per cent.) fifty per cent. of manganese, the seller agrees to give an allowance of six (6) annas per unit for the inferiority."

To the bought note sent to the plaintiffs, Messrs. Martin & Co., were attached two copies of certain analyses which had been made on behalf of the defendant of the ores from his mines. No such copies were attached to the sold note as the defendant had the original analyses in his possession.

The suit came on for hearing before Harington J. who gave judgment in favour of the plaintiffs for Rs. 25,000 and costs. Against this judgment the defendant has appealed. Upon the appeal coming for hearing before us, three questions have been argued on behalf of the appellant:—

(i) Whether there was any concluded contract between the parties by reason of the fact that no copies of the analyses were attached to the sold note?

(ii) Whether, if there was a valid contract, the tender of certain ore, known as Domree ore, was a good tender within the meaning of the contract?

(iii) As to the principle on which the learned Judge has assessed the damages.

On the first point it is necessary to say very little. It appears from the evidence that the originals of the analyses were in the possession of the defendant, and that he had given copies thereof to Buskin. The defendant knew very well what the analyses referred to in the contract were, and he never took this objection until after the suit was instituted.

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We, therefore, think there is nothing in the first point raised by the defendant, the appellant before us.

Turning next then to the second point as to whether the tender of the Domree ore was a good tender within the meaning of the contract, we have in the first place to determine what is the meaning of the contract.

The learned Judge has held that under the contract the seller bound himself to deliver ore containing between 57·05 and 59·66 units of manganese, and that the buyers were not bound to accept ore not containing these proportions of manganese, although they had the option to accept ore containing less than 50 units of manganese. With this construction of the contract we are unable to agree, and it has been admitted at the Bar that under the contract the buyers were bound to accept ore containing 50 units of manganese and even less subject to the allowance specified in the contract, provided that the ore was merchantable within the meaning of the contract and provided in both cases that the ore in other respects complied with the terms of the analyses.

It seems to us reasonably clear that the analyses were attached to the contract for the purpose of guaranteeing that the ore to be delivered should not contain larger quantities of phosphoric and silic matter than those shown in the analyses.

Coming then to the evidence relating to the tender of the Domree ore, it is not necessary for us to go through the early correspondence between the parties. It is sufficient to say that the plaintiffs had made frequent and repeated complaints to the defendant as to the non-delivery of any of the ore under the contract. On the 25th October Mr. Hance, an agent of the plaintiffs, wrote to the defendant that he could not accept any of the Domree ore then at Kamptee.

To this the defendant replies on the 29th October as follows :—" I have nothing but Domree ore to offer you, and as you have given me distinctly to understand that you cannot accept any of my ores from this mine in completion of the above contract, please note that if you do not forthwith

take delivery of the Domree ore that is now lying at Kamptee station, which I tender under the above contract, I will consider the contract cancelled." This letter was replied to by Messrs. Morgan & Co., solicitors for the plaintiffs, stating that the ore tendered was of an inferior quality to that contemplated by the contract and threatening proceedings. The defendant replied to Messrs. Morgan & Co.'s letter on the 5th November, stating that "the ore I offered to your clients is of the quality contemplated for delivery under the above contract. As your clients have refused to accept this ore and have not taken delivery of the same in terms of the contract, I have instructed by seller not to despatch any more ore to the Kamptee station on my account, and I must, therefore, give your clients notice through you that I hereby cancel the contract with them."

The evidence shows that this Domree ore which was tendered by the defendant showed on analysis a percentage of 39.68 of manganese. The learned counsel for the appellant has challenged this fact, but we see no reason to differ from the learned Judge in finding that the ore tendered contained only a percentage 39.68 of manganese. The evidence further shows that Domree ore is unmarketable in India—also that there is a grade of ore known as first class ore which contains 50 per cent. and upwards of manganese. Taking these facts into consideration, it is impossible for us to differ from the finding of the learned Judge that the Domree ore was not a good tender of ore within the meaning of the contract.

Lastly as to the question of damages. The learned Judge has proceeded on the basis that having regard to the fact that the defendant repudiated the contract, the measure of damages was the difference between the contract rate and the market rate on the 15th February, and further that as there was no market rate in February the *quantum* of damages must be assessed by reference to the market rate in March, which was the next period on which there was a market rate. We are unable to agree with the learned Judge either as to the

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measure of damages or as to the mode of estimating the amount thereof.

Under the contract if the defendant had delivered to the plaintiff 500 tons of ore before the 31st October, 1,000 tons before the 30th November, 1,500 tons before the 31st December, and the remaining 2,000 tons before the 15th February 1907, the plaintiffs would have had no cause of action against the defendant.

The contract was in fact a set of distinct contracts, and as each period arrived if no delivery has taken place, the damages will be the difference between the contract price and the market price on that day of the quantity which ought then to have been supplied: and even if the defendant absolutely repudiates his contract at any period previous to the final date specified in the contract, yet in considering the question of damages they will be estimated with reference to the times at which the contract ought to have been performed: *Josling v. Irvine* (1), *Brown v. Muller* (2), *Roper v. Johnson* (3).

We, therefore, think that the learned Judge in treating the breach as a single breach on the 15th February 1907 was wrong. Nor are we able to agree with the learned Judge that as there was no market value for manganese ore on the 15th February 1907, the plaintiffs are entitled to damages assessed on the footing of the next nearest market rate.

Whether there be a market rate or not the principle on which the damages are to be assessed is exactly the same, *viz.*, the value of the goods at the date of the breach or breaches. But if there is no market rate, the mode of estimating this value is different but comes back to the elementary principle—what were the goods worth at the time?

Now, it is admitted that there is a free market for manganese ore in England and that the plaintiffs intended to ship the ore to England. In assessing the damages, therefore, on this contract for such of the breaches at the date of which there was no market rate in Calcutta, we think that the principle adopted

(1) (1861) 6 H. & N. 512.

(2) (1872) L. R. 7 Ex. 319.

(3) (1873) L. R. 8 C. P. 167.

in the case of *Borries v. Hutchinson* (1) is the one that ought to be proceeded upon, namely, that the damages for those breaches is the value to the plaintiffs of the portions that ought to have been delivered on those dates at the prices he would have got for them in England less the cost of getting them there.

We accordingly vary the decree of the learned Judge in so far as he directed that the defendant should pay to the plaintiffs the sum of Rs. 25,000, and in lieu thereof we direct an enquiry before the Official Referee as to damages on the footing of the foregoing remarks.

We think there ought to be no costs of this appeal. The order for costs in the Court of first instance will stand.

The costs of the inquiry before the Referee will be dealt with after the reference.

BRETT AND FLETCHER JJ. concurred.

Decree varied.

Attorneys for appellant: *Pugh & Co.*

Attorneys for respondents: *Morgan & Co.*

J. C.

(1) (1865) 18 C. B. N. S. 445.

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APPELLATE CIVIL.

Before Mr. Justice Sharfuddin and Mr. Justice Coxe.

KANAI PROSAD BOSE

v.

JOTINDRA KUMAR ROY CHOWDHURY.*

*Principal and Surety—Breach of Contract—Variance in terms of Contract—
Surety, liability of—Contract Act (IX of 1872), s. 133.*

A entered into a surety bond on behalf of B for the due performance of the duties of B as a *tehsildar* under the terms of a contract, the security being limited to a fixed amount. One of the terms was that B should render account of his *tehsil* every year. B did not render account for the year 1308, and was allowed to realize rents for 1309 in breach of the terms of the contract. In a suit for account against B and his surety :—

Held, that there was no variation in the contract between the parties as contemplated by s. 133 of the Contract Act, and that the surety was liable.

SECOND APPEAL by Kanai Prosad Bose, the defendant
No. 2.

The facts were briefly as follows :—The plaintiffs held certain lands standing in their names. The defendant No. 1 executed a *kabuliat* in favour of the plaintiff No. 1 and was appointed *tehsildar* in respect of these lands of the plaintiffs. In order to secure the due performance of the *tehsildar's* duties, one Kanai Prosad Bose, the second defendant in the original suit, stood surety for the defendant No. 1 and executed a surety bond in favour of the plaintiff No. 1, the liability being limited to Rs. 200 only. One of the terms of the contract was that unless the *tehsildar* rendered account of his *tehsil* of any year, he should not continue the work of collection next year. The defendant No. 1 did not duly render accounts for the whole year, 1308 B.S., and continued in office the whole of 1309 and up to the end of Sraban 1310. A suit was instituted in the Munsif's Court at Rungpur against both

* Appeal from Appellate Decree, No. 603 of 1907, against the decree of K. C. Mukerjee, Subordinate Judge of Rungpur, dated Nov. 26, 1906, affirming the decree of Kumud Bandhu Gupta, Munsif of Rungpur, dated July 30, 1906.

the defendants for account. The surety alone contested the suit which was decreed against both the defendants. On appeal preferred by the surety, the Subordinate Judge dismissed the appeal.

The surety, thereupon, appealed to the High Court.

Babu Baidyanath Dutt (Babu Hem Chandra Mitter with him), for the appellant. The question here is whether, looking at the terms of the deed and the decree, the terms of the contract were varied. There was substantial variation in the terms, the *tehsildar* having been allowed to continue in office from 1308 to Sraban 1310 without rendering accounts. This has gone to enhance the liability of the surety, which might have been increased to any amount. A man cannot be allowed to benefit by his own laches at the expense of a third party, viz., the surety in this case, and the surety cannot be sued if there has been a substantial variation of the contract so as to increase his liability. I rely on section 133 of the Contract Act : see Pollock and Mulla's Contract Act, 1905, pp. 385, 388 ; *Damodar Das v. Muhammad Husain* (1).

Babu Brojendra Nath Chatterjee, for the respondents, was not called upon.

SHARFUDDIN AND COXE JJ. This was a suit for accounts by the zemindar against his *tehsildar* and one Kanai Prosad Bose, who stood surety for the due performance of the *tehsildars'* duties. The Courts below have decreed the suit and the surety appeals. The ground of the appeal is that, as the contract between the zemindars and the *tehsildar* was varied, the surety was discharged from liability by section 133 of the Contract Act. The terms of the contract to which reference has been made are as follows :—" As long as I do not make over the *tehsil* in my *jimba* on clearing my *nikash* of any year to your satisfaction, I will not be able to take up the work of realizations and collections from the said mehals for the following year." It is said that the *tehsildar* did not render accounts

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for the year 1308, but notwithstanding that omission continued to realize rent for 1309. We do not think that this amounted to a variation of the contract. The breach of a contract is not a variation of it. Under the contract it was stipulated that if the accounts were not rendered the *tehsildar* should pay Rs. 50 a year as the cost of having them prepared. Doubtless also the zemindar had other remedies. He could probably dismiss the *tehsildar*, or take the work away from his hands. But the mere fact that he did not enforce any of these remedies immediately did not amount, in our opinion, to a variation of the original contract. The original contract remained the same. If the *tehsildar* committed a breach of the contract by realizing rent for 1309, the zemindar was able to enforce the original contract and the remedies which he had under it. It is not stated that the zemindar and the *tehsildar* ever met together and came to any agreement on the subject. All that happened was that the *tehsildar* to a certain extent broke his part of the contract and the zemindar did not immediately enforce his remedies under it.

It is argued that the surety might in this way become liable for the defalcations of several years, although it was originally intended that the accounts should be completed and rendered at the end of each year. But the security was limited to a fixed amount, and it could at any time have been revoked by the surety.

In our opinion, there was no variation in the contract between the parties, and we think, therefore, that the decisions of the Courts below were right, and that this appeal must be dismissed with costs.

O. M.

Appeal dismissed.

CRIMINAL REFERENCE.

Before Mr. Justice Caspersz and Mr. Justice Ryves.

EMPEROR

v.

ANNADA CHARAN THAKUR.*

1909

May 5.

Reference to High Court—Acquittal by Jury—Powers of the High Court—“Opinion” of Jury in cases of divided verdict—Consideration of entire evidence—Verdict not unreasonable on the face of the charge—Pardon—Omission to state reasons when facts leading to grant of pardon appear on the record—Criminal Procedure Code (Act V of 1898), ss. 307, 337(4).

Where the facts which led up to the tender of pardon appear on the record, the omission by the Magistrate granting it to state his reasons for so doing is not an illegality nor even an irregularity which vitiates the subsequent proceedings.

Deputy Legal Remembrancer v. Banu Singh (1) followed.

The High Court cannot throw out a reference under s. 307 of the Criminal Procedure Code merely because it might be argued, upon the face of the charge to the Jury, that the verdict was not altogether an unreasonable one, but it must consider the entire evidence and arrive at its own judgment after giving due weight to the opinions of the Judge and Jury.

Emperor v. Lyall (2) and *Emperor v. Abdul Rahaman* (3) followed.

King-Emperor v. Chidghan Gossain (4), *Emperor v. Anaruddin Biswas* (5), *King-Emperor v. Anes* (6) and *King-Emperor v. Prasanna Kumar Ganjuli* (7) referred to.

Emperor v. Chirkua (8) dissented from.

The opinion of the Jury is their conclusion and not the reasons therefor, and in the case of divided verdicts the opinion of the minority must also be considered by the Court. The Legislature in directing the High Court to duly weigh the opinion of the Jury gives an implied authority for the taking of their reasons for the verdict, and the Judge will do well before making the reference to invite such reasons, not for the purpose of deciding whether it should be made, but for consideration by the High Court, after having made up his mind to refer the case and after telling the Jury of his intention to do

* Criminal Reference No. 2 of 1909, by A. Majid, Sessions Judge of Rajshaya, dated Jan. 22, 1909.

(1) (1906) 5 C. L. J. 224.

(2) (1901) I. L. R. 29 Calc. 123.

(3) (1908) 9 C. L. J. 432.

(4) (1902) 7 C. W. N. 135.

(5) (1903) Unreported.

(6) (1908) Unreported.

(7) (1907) Unreported.

(8) (1905) 2 All. L. J. 475.

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so. But the omission to take or record the reasons does not warrant the High Court in declining to go into the evidence.

Emperor v. Chellan (1) referred to.

CRIMINAL REFERENCE.

The accused, Annada Charan Thakur and Pratap Shaha, were tried with another, who died during the trial, before Abdul Majid, Sessions Judge of Rajshaye, and a Jury, charged, the first, under sections $\frac{302}{114}$ and 392 of the Penal Code, with robbery of the mail from Rampur Boalia to Natore and abetment of murder by Pratap of the mail-cart driver, Halalkhuri, and the second, under sections 302 and 392 of the Penal Code, with having committed the same robbery and the murder of the driver. The Jury acquitted Annada by a majority of 4 to 1, and Pratap in the proportion of 3 to 2. The Sessions Judge referred the case under section 307 of the Criminal Procedure Code differing "completely from the verdict of the majority, and being clearly of opinion that it was necessary for the ends of justice to do so."

On the evening of the 3rd August 1908, Halalkhuri, who was a driver of the pony mail-cart in the service of the Rajshaye Carrying Company, took delivery of the mail at the Rampur Boalia head Post Office and then proceeded to the branch Post Office at Ghoramara, whence, after receiving the postal bag, he started with a passenger on the cart, alleged to be the accused Annada, at 7-30 or 7-45 p.m., for Natore, 28 miles distant from Rampur Boalia. On the way he picked up two other passengers, supposed to be one Durlabh and the appellant Pratap, at the Panchani cutcherry. They then went on to Samsadipur where Durlabh alighted, leaving the others to continue the journey. In the early morning of the 4th August the dead body of the driver was found on the roadside, a few yards away from the 24th mile-post, covered with incised wounds. The cart was discovered in a paddy field about 90 cubits from the road. The mail bags were cut open and the contents taken out and arranged, but the only articles

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abstracted turned out to be some copies of the P. W. D. Code and a few money-order application forms. The case for the prosecution was that it was the object of Annada to secure possession of the certified copy of a will and the records of a suit in the District Judge's Court which he believed were in the bags in the course of transmission to the High Court.

One Abdus Sobhan, who was for some time a *lathial* in the service of Annada and his father, was arrested by the police on the 23rd September, and made a full confession of his guilt before Wajiuddin Ahmed, Deputy Magistrate of Natore, on the 24th and 25th September, shortly to the effect that by arrangement with Annada he met the postal cart at a certain spot on the road and aided in the robbery and murder. The confession was recorded under section 164 of the Criminal Procedure Code. On the 14th October the Sub-Inspector of Police, Pyari Kumar Burdhan, sent up Annada, Pratap, Kali Charan and Abdus Sobhan to the Magistrate with the following remarks in the charge-sheet: "There is no eye-witness in this case, except all circumstantial evidence. I, therefore, suggest that if the confessing accused, Abdus Sobhan, discloses the true facts without concealing anything, then he may be taken as King's evidence, otherwise not." The committing Magistrate thereupon, on the next day, tendered a pardon to Abdus Sobhan on the ground, as stated in the order of commitment, that there were no eye-witnesses of the occurrence, and then examined him as a witness in the case.

The evidence against the accused consisted of the testimony of the approver and of circumstantial evidence.

Mr. Donogh, for the Crown, after reading the letter of Reference, dealt with the evidence and then commented on the charge to the Jury.

Mr. K. N. Chaudhuri (*Babu Hemendra Nath Sen* and *Babu Krishna Kamal Mitter* with him), for the accused. The committing Magistrate did not record the reasons for tendering a pardon to the approver. The wording of section 337 (4) of the Code

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renders this essential. The Magistrate must show proper grounds for granting the pardon, and there should have been corroborative evidence before him: Russell on Crimes, 3rd edition, Vol. III, page 644; *Reg. v. Sparks* (1). Further, there is no evidence on the record that the approver accepted the pardon. The case of *Deputy Legal Remembrancer v. Banu Singh* (2) is distinguishable, as the circumstances under which pardon was there granted disclosed the reasons for it. In a reference under section 307, the Crown must substantiate the reasons given by the Judge for his view. It is not sufficient that he has disagreed or that the Jury were divided. There is no reason for referring the present case, as it does not appear on the face of the charge to the Jury that the verdict is unreasonable. If the charge does not disclose substantial reasons, the point of view from which the evidence should be considered is whether the Jury has taken an unreasonable and obtuse view, and not whether the High Court would convict upon it: *King-Emperor v. Chidghan Gossain* (3), *Emperor v. Chirkua* (4), *Emperor v. Anaruddin Biswas* (5), *King-Emperor v. Anes* (6), *King-Emperor v. Prasanna Kumar Ganguli* (7). No cases are cited in *Emperor v. Lyall* (8) in support of the view there taken. [He then went on to discuss the details of the evidence.]

Cur. adv. vult.

CASPERSZ, J. This is a Reference under section 307 of the Code of Criminal Procedure by the Sessions Judge of Rajshaye who disagreed with the verdict of the Jury acquitting the accused persons, Annada Charan and Pratap Shaha. The charges against the accused Annada were in respect of offences punishable under sections $\frac{302}{114}$ and 392 of the Indian Penal Code, and against the accused Pratap under sections 302 and 392 of the Code. The Jury, by a majority of four to one, acquitted the first accused, and by a majority of three to two

(1) (1853) 1 F. & F. 388.

(2) (1906) 5 C. L. J. 224.

(3) (1902) 7 C. W. N. 135.

(4) (1905) 2 All. L. J. 475

(5) (1908) Unreported.

(6) (1908) Unreported.

(7) (1907) Unreported.

(8) (1901) I, L, R. 29 Calc. 128,

acquitted the second accused on all the charges. One Kali Charan Thakur, the father of the accused Annada, died during the trial, and another accused, named Abdus Sobhan, was made an approver in the Court of the committing Magistrate, and he was examined as such in the Court of Session.

Before dealing with the merits of this Reference, it will be convenient to dispose of two matters of law upon which the learned counsel for the accused has made his submissions to this Court. Mr. Chaudhuri's first contention is that the committing Magistrate, in tendering a pardon to the approver, Abdus Sobhan, illegally omitted to record his reasons for so doing. I do not think that there is any force in this contention, or that the omission was an illegality by reason of which the evidence of Abdus Sobhan is inadmissible for the purpose of considering the merits of this case.

The facts, so far as it is necessary to mention them in this part of the judgment, are these. Halalkhuri, a driver of the postal mail-cart plying between Rampur Boalia and Natore in the district of Rajshaye, was murdered on the night of the 3rd August 1908 at a place on the road to Natore and situated about four miles distant from Natore. The mail bags were opened and examined, and a certain parcel was abstracted. The case has been called the Natore Mail robbery case; and a large force of police conducted the necessary investigation with the result that, on the 23rd September 1908, the four accused persons, whose names have already been mentioned, were arrested. Against all the accused a charge-sheet was submitted by the Sub-Inspector, Pyari Kumar Burdhan, on the 14th October 1908. In that charge-sheet the Sub-Inspector suggested that a pardon might be tendered to the accused Abdus Sobhan on the usual terms and conditions. The Deputy Magistrate took up the case, and, after the examination of two witnesses, he drew up a proceeding under section 337 of the Code of Criminal Procedure to the following effect :—

“Pardon is hereby tendered to the accused Abdus Sobhan in the marginally noted case (Emperor v. Kali Charan Thakur,

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Annada Charan Thakur, Abdus Sobhan and Partap Shaha, under sections 302, 395 and 109 of the Indian Penal Code) on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the murder of Halalkhuri, and of every other person concerned whether as principal or abettor. Abdus Sobhan accepts the pardon and is examined as a witness. (Signed) Girish Chandra Dutt, Deputy Magistrate, Rajshaye, 15-10-08."

It is quite evident, therefore, that the pardon was tendered to Abdus Sobhan in the course of the enquiry before the committing Magistrate. The facts which led up to the tender of pardon appear on the record, and that being so, on the authority of the case of *Deputy Legal Remembrancer v. Banu Singh* (1), there is no doubt that the omission to state the reasons was not only not an illegality but not even an irregularity which vitiates the proceedings held subsequent to such tender and acceptance of pardon. The procedure adopted by the Deputy Magistrate was perfectly justified by the facts and circumstances of the case as known to him and appearing from the papers.

The second contention of the learned counsel for the accused relates to the procedure adopted in this Court on the hearing of this Reference, and we have been invited by Mr. Chaudhuri to make a reference on the subject to a Full Bench in the event of it appearing that there is any conflict of decision upon the point. The contention amounts to this, that there was really no reason for the Sessions Judge to make a reference to this Court under section 307 of the Criminal Procedure Code, because, on the face of the Sessions Judge's charge to the Jury, it does not appear that the verdict was an unreasonable one. The contention arose during the protracted hearing of the arguments in this Court because Mr. Donogh, for the Crown, did not read the Sessions Judge's charge to the Jury until after he had placed the letter of Reference and all the evidence before this Bench. If the

contention be right, and if, on the face of the charge to the Jury, the verdict cannot be called perverse or unreasonable, it was clearly superfluous to enter into the merits of the case and the voluminous evidence on the record.

In my opinion the procedure adopted at the hearing was neither unusual nor inconvenient. In the first place, the verdict of the Jury was inconsistent. Four Jurors acquitted Annada against whom the evidence, if believed, was certainly stronger than the evidence against the accused Pratap who was acquitted by a smaller majority of three to two. Secondly, in dealing with a Reference under section 307 of the Code, the High Court must consider the entire evidence and give due weight to the opinions of the Sessions Judge and the Jury.

It was held in *Emperor v. Chellan* (1) that the "opinion" of the Jury, in section 307 of the Code of Criminal Procedure, is the conclusion of the Jury, and not the reasons on which that conclusion is based. I think that if the verdict of the Jury is unanimous, it coincides with their opinion. If it is a divided verdict, the opinion of the minority, no less than that of the majority, must be considered by the Court dealing with the Reference. In the present case, the opinions to which due weight must be given are the opinions of three Jurors against the opinions of two Jurors and the Sessions Judge. The verdict here is a bare verdict. But, supposing the Sessions Judge, after recording the verdict, had recorded (after inviting) the reasons given by the Jury for their verdict, we should have been entitled to consider those reasons whether expressed by the majority or the minority of the Jurors empanelled. I am disposed to agree with the observations of Mr. Justice Davies, at page 95 of the report of *Emperor v. Chellan* (1) that "the Legislature in directing that this Court should duly weigh the opinions of the Jury gives an implied authority for the taking of such opinions," and the Sessions Judge would have done well, before referring this case to this Court, to have invited the opinions of the Jury and to have

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given them an opportunity of reconciling the inconsistent verdict in respect of the two accused persons. I am careful to add that the Sessions Judge might have done so, not for the purpose of deciding whether a reference should be made, but after arriving at his conclusion to refer the case to the High Court and after telling the Jury that such was his intention. I also agree with the judgment of Sir S. Subrahmanya Ayyar, officiating Chief Justice, and Mr. Justice Boddam, that "the circumstance that no such reasons have been recorded by the Sessions Judge does not warrant the High Court to decline to go into the evidence and to arrive at its own judgment after giving due weight to the views taken by the Judge and the Jury as to the guilt or innocence of the accused."

It follows that we have to form our own opinion on the evidence, and this brings me to the third consideration involved in this question of law, namely, whether the procedure which has been followed is in accordance with the authorities, reported and unreported, to which our attention has been called by the learned counsel for the accused.

The circumstances of the case are altogether special. I have already mentioned the inconsistency involved in the verdict of the Jury. It may be added that the trial in the Court of Session occupied more than six weeks of the time of the Sessions Judge and the Jury. It would have been an obvious disregard of our duty to have thrown out this Reference, merely because it might be argued upon the face of the charge to the Jury that the verdict was not altogether an unreasonable one.

The first case to which I may refer is that of *Emperor v. Chirkua* (1). That, no doubt, is in favour of Mr. Chaudhuri's contention. But it was a decision of Mr. Justice Richards sitting with Banerjee, J. in a reference where neither party was represented and where no authorities were considered. With the greatest respect for the learned Judge, I think that his judgment is in direct conflict with the plain wording of

section 307 of the Code of Criminal Procedure. In his commentary on the Code, Sir Henry Prinsep observes :—" The result of legislation seems to be that, unless the Sessions Judge accepts it, the verdict of a Jury in a Sessions Court, outside a Presidency town, has no longer the ordinary force of a verdict of a Jury, and that, if the Sessions Judge disagrees with a verdict and submits the case to the High Court, the determination of the case lies with the High Court after full consideration of the evidence and after giving due weight to the opinions of the Sessions Judge and of the Jury."

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In the case of *Emperor v. Anaruddin Biswas* (1) (Criminal Reference No. 33 of 1908, decided on the 11th November 1908, the learned Judges (Holmwood and Ryves, JJ.) observe " We cannot hold that the Jury were not justified in taking the view that they did, or at least that it was not open to the Jury to take the view that they did. That in a Reference under section 307 is quite sufficient." But they go on to consider whether there had been a miscarriage of justice, and it is evident that they considered the case on its merits. In this connection I shall presently notice another and a matured decision of the same learned Judges in which they have more clearly expounded the law.

In the case of *King-Emperor v. Anes* (2) (Criminal Reference No. 6 of 1908, decided on the 10th March 1908), Mr. Justice Geidt sitting with Mr. Justice Woodroffe heard the evidence and, on a consideration of that evidence, they expressed themselves as not prepared to say that the majority of the Jury were wrong in refusing to act on it. The learned Judges added that " there is nothing to show that the verdict of the Jury was perverse or that they refused to convict the accused on any other ground than the *bonâ fide* belief that it would not be safe to convict them on the evidence which was placed before the Court." In my opinion the learned Judges did no more than give due weight to the verdict of the Jury in that reference.

(1) (1903) Unreported.

(2) (1908) Unreported.

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The last unreported case is that of *King-Emperor v. Prasanna Kumar Ganguli* (1) (Criminal Reference No. 14 of 1907, decided on the 27th May 1907) which was decided by Mr. Justice Mitra and myself. There, also, the merits were entered into, and the opinion of the Sessions Judge was considered, and it was pointed out that the element of doubt in the case which, in the opinion of the Sessions Judge, was 1 in 177,000, was in reality much greater, and the judgment concluded with the observation that "the circumstances were very suspicious, and it might be that the accused was guilty. But it cannot be said that the guilt of the accused is morally certain."

If any of the unreported cases had been clear authority for the extreme contention which has been submitted to us, they would have found a place in the Law Reports.

There are reported cases on the subject and I proceed to consider these. In the case of *Emperor v. Lyall* (2) the reference was against an unanimous verdict of the Jury acquitting the accused. Mr. Pugh, counsel for Lyall, the principal accused in the case, cited authorities to the effect that the High Court must act in accordance with the unanimous verdict of the Jury, unless it was shown to be perverse or clearly and manifestly wrong. The learned Judges (Prinsep and Stephen, JJ.) overruled his contention, and pointed out that the terms of section 307 of the Code of 1882 had been altered by subsequent legislation, and they observed :—"It is not necessary for the prosecution to show that the opinions of the Jury are perverse or clearly and manifestly wrong, as was held in the cases cited to us which were decided before the law was amended in 1896 and expressed as it now stands."

In a somewhat later case, *King-Emperor v. Chidghan Gossain* (3), Mr. Justice Stevens sitting with Mr. Justice Harington pointed out "that the Sessions Judge was not justified in taking up the time of this Court by making a refer-

(1) (1907) Unreported.

(2) (1901) I. L. R. 29 Calc. 128.

(3) (1902) 7 C. W. N. 135.

ence in a case in which the evidence for the prosecution was, on his own showing in his charge to the Jury, so open to hostile criticism as to justify the Jury in regarding it with suspicion." (page 140). Nevertheless, the learned Judges went very fully into the merits of the case, and they certainly did not reject the Reference merely because the Sessions Judge ought not to have made it.

The last case to which our attention has been called is a decision of Mr. Justice Holmwood and my learned brother, Mr. Justice Ryves, in *Emperor v. Abdul Rahaman* (1), where the two cases which have just been cited were considered. It admits of no doubt that this case is a fuller exposition of the law than that enunciated in the unreported case of *King-Emperor v. Anaruddin Biswas* (2) (Criminal Reference No. 33 of 1908, decided on the 11th November 1908 by Holmwood and Ryves, JJ.), to which reference has been made.

The contention of the learned counsel that the case of *Emperor v. Abdul Rahaman* (1) should not have been referred under section 307 of the Criminal Procedure Code, because the Sessions Judge himself in his charge to the Jury warned them that they should certainly pause and consider a particular circumstance in the evidence of the prosecution, and that it was, therefore, fairly open to the Jury to acquit the accused, was not accepted, and the learned Judges proceeded to consider the evidence in the case which appeared to be clear and convincing, and the result of the reference was that the accused was convicted.

I have now dealt with all the cases cited, and in my opinion there is no real conflict of decision or want of uniformity in the procedure adopted by this Court on the hearing of this Reference under section 307 of the Code. It is obvious that in every case, even where the verdict was unanimous, the Court proceeded to consider the merits and to hear the evidence. I have indicated how the opinions of both the Sessions Judge and of the Jury, including a

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1) (1908) 9 C. L. J. 432.

(2) (1908) Unreported.

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minority of the Jury, are entitled to due weight in accordance with the express language of section 307 of the Code. The procedure adopted by Mr. Donogh in the present case was perhaps unusual, but, regard being had to the length of the Sessions Judge's charge to the Jury and to the evident want of arrangement and method in marshalling the materials presented to the Jury, we thought that the learned counsel for the Crown should not be pressed to place the charge before us at an early stage of the hearing. It was subsequently placed before us, and the contention of Mr. Donogh was that the Sessions Judge did not put the evidence against the accused sufficiently strongly before the gentlemen of the Jury. We have carefully read and considered the charge for ourselves, and, even if it had been read to us at the very commencement of the hearing, we should not have been in a position to say that the Jury were justified in acquitting the accused. In the circumstances of this case it was impossible to limit the hearing or to confine it to a consideration of the charge to the Jury and the points made therein for or against the case for the prosecution.

There may be cases in which a Sessions Judge unnecessarily makes a Reference under section 307, but, in such cases, the Crown would certainly not press the Reference, and so it might be disposed of on a bare consideration of the charge to the Jury and of the material passages in the evidence. But this is not one of those cases.

I would accordingly overrule the second contention advanced by the learned counsel for the accused, and proceed to deal with the evidence.

I have read the judgment about to be delivered by my learned brother, and, without repeating his observations, I content myself with saying that I entirely agree with that judgment.

RYVES, J. I agree generally in the conclusions of law arrived at by my learned brother.

On the second point I wish to add only a few words.

Mr. Chaudhuri's contention is that if it can be shown to this Court, on behalf of the accused, that a perusal of the letter of Reference of the Sessions Judge, under section 307 of the Criminal Procedure Code, and of his charge to the Jury, shows that the verdict of acquittal (whether unanimous or divided) was not unreasonable, this Court could not, or at any rate should not, go into the evidence and examine the case on its merits, but must, having due regard to the opinion of the Jury, reject the Reference.

It seems to me this contention goes much too far, and is not supported by any one of the cases, reported or unreported, to which he has referred. Among other cases, which have been duly considered by my learned brother, he relies on the unreported case of *Emperor v. Anaruddin Biswas* (1) (Criminal Reference No. 33 of 1908, decided on the 11th November 1908), to which I was a party. That case is no authority for this proposition, for there we did examine the whole record, and, in the result, arrived at the conclusion that we should not disturb the unanimous finding of the Jury. In that case the Judge considered that the statements made by the accused were "confessions" of their guilt. We pointed out that they were not, but on the contrary were "pleas in avoidance." In that case the scope of section 307 was not, so far as I recollect, commented on in argument nor was it in issue. It was a peculiar case on its facts and the Judge had misinterpreted the statements of the accused. No authorities were cited and considered, and it was not a considered judgment. In however general terms the judgment may have been couched, it is no authority for the proposition now contended for. Personally I now think the latter part of the judgment has been expressed too widely. I adhere to the opinion expressed in the considered judgment which I delivered in the case of *Emperor v. Abdul Rahaman* (2) (in which Holmwood, J. concurred) in which the scope of the section was in issue, and in which authorities were cited and considered.

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[His Lordship then dealt with the facts of the case, and acquitted both the accused.]

PER CURIAM : We do not think it necessary to comment on all the evidence placed before us in detail. A brutal murder and robbery remains undetected and unpunished, principally, as it seems to us, because the salient features in the case were overlooked, namely, the clue furnished by the evidence of Bangshi on the 4th August, and the significant fact that the only postal packet abstracted was the one containing Codes of the Public Works Department. The learned Sessions Judge, however, bestowed great pains on the trial of the case, and, though his charge to the Jury lacks arrangement and method, we recognise the care and the ability displayed.

The result is, in our opinion, that the prosecution have failed conclusively to prove their case. We, therefore, under section 307, clause (3) of the Criminal Procedure Code, acquit the accused, Annada Charan Thakur and Pratap Shaha, and we direct that they be immediately released.

Accused acquitted

E. H. M.

CRIMINAL REVISION.

Before Mr. Justice Caspersz and Mr. Justice Ryves.

EMPEROR

v.

ABDUS SOBHAN.*

1909
May 17.

Practice—Criminal motion to High Court without previous application to lower Court with concurrent jurisdiction—Criminal Procedure Code (Act V of 1898) ss. 435 to 439.

The High Court will not entertain an application for revision in cases where the Sessions Judge or Magistrate has concurrent jurisdiction, whether final or not, save on some special ground, unless a previous application has been made to the lower Courts: but where concurrent jurisdiction is not possessed by the lower Courts, no such general rule exists.

Queen-Empress v. Reolah (1) followed.

THE petitioner, Bhuyan Abdus Sobhan Khan, was tried and convicted by M. M. Roy, a Deputy Magistrate of the first class at Balasore, and sentenced on the 30th March 1909, under section 506 of the Penal Code, to a fine of Rs. 100, and in default to one month's rigorous imprisonment. He moved the High Court in revision against the conviction and sentence on various grounds, without, however, having made an application to the Sessions Judge or the District Magistrate under sections 435 and 438 of the Criminal Procedure Code.

Mr. Arthur Caspersz and Babu Atulya Charan Bose, for the petitioner.

CASPERSZ AND RYVES JJ. This is an application for the review of an order of a first class Magistrate, dated the 30th March 1909. We are informed that no application on the subject has been made to the Sessions Judge of Cuttack with a view to his referring any error on a point of law for

* Criminal Motion against the order of M. M. Roy, Deputy Magistrate of Balasore, dated March 30, 1909.

(1) (1887) I. L. R. 14 Calc. 887.

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final determination by this Court. The practice which ought to be followed in such cases is that indicated in the case of the *Queen-Empress v. Reolah* (1), where it was laid down that "the High Court will not entertain an application for revision in cases where the District Court or Magistrate has concurrent revisional jurisdiction with the High Court, save on some special ground shown, unless a previous application shall have been made to the lower Court: but in cases in which concurrent jurisdiction is not possessed by the lower Courts, no such general rule exists." That was a decision arrived at after consultation with the Chief Justice and the other Judges of this Court on the point. We are not prepared to differ from it. We think it is a ruling which should be adhered to.

Two points arise in this connection. The first is whether the practice is one that will prevail in future, and, secondly, whether the concurrent jurisdiction referred to in the case of the *Queen-Empress v. Reolah* (1), means concurrent *final* jurisdiction, as for instance, that which is exercised in cases under section 437 of the Criminal Procedure Code where further enquiry can be ordered by the Sessions Judge or by this Court.

With regard to the first question, we certainly think it desirable that the practice should be uniform, and we have every reason to believe that it will be uniform.

With regard to the second contention, all we need say is that the case of *Queen-Empress v. Reolah* (1) was with reference to section 435 of the Code, and not one in which the Sessions Judge was competent to pass the final order.

The learned counsel has asked that this application may be returned to him without prejudice to his client to come up to this Court, if necessary, after he has applied to the Sessions Judge. We think it will be proper to return him the application.

Let the application, therefore, be returned for the purpose indicated.

Application returned.

REFERENCE FROM THE BOARD OF
REVENUE.

Before the Hon'ble Mr. R. Harington, Acting Chief Justice, Mr. Justice Mookerjee and Mr. Justice Richardson.

*In re R. BAXTER.**

1909
April 15.

Stamp-duty—Refund of Stamp-duty—Stamp Act (II of 1899), s. 52(a), Sch. I, Art. 30, Exemption—Attorney—Entry on Roll of Advocates.

B, who had been enrolled as an attorney of the High Court of Calcutta and paid the requisite stamp-duty of Rs. 250, was subsequently enrolled as an advocate of the same Court and paid a stamp-duty of Rs. 500. On an application by *B*. for a refund of the latter stamp-duty, by virtue of the exemption to Article 30, Schedule I of the Indian Stamp Act of 1899 :—

Held, that exemption could be claimed and that the stamp-duty of Rs. 500 should be refunded.

REFERENCE from the Board of Revenue.

This was a reference by the Board of Revenue under section 57(1) of the Indian Stamp Act (II of 1899). The material facts are fully set out in the case stated by the Board for the decision of the High Court. It was as follows :—

“Mr. R. A. Baxter, now practising as a Barrister-at-law in Bankipore, was enrolled as an attorney of the High Court of Calcutta on the 23rd November 1889, and paid stamp-duty of Rs. 250 under Article 27, Schedule I of the Indian Stamp Act I of 1879. He had not previously paid the duty of Rs. 250 for Articles of Clerkship, not having served his Articles in India.

1. In January 1908, he was enrolled as an advocate of the High Court and paid a stamp-duty of Rs. 500 under Article 30 (a), Schedule I of the Indian Stamp Act (II of 1899). The question of exemption from stamp-duty was not then raised, and, therefore, was not considered at the time of entry. Mr. Baxter subsequently raised this question, and after correspondence with the Registrar, High Court, was referred to the Revenue authorities. Mr. Baxter has accordingly applied to the Board for a refund of the stamp-duty of Rs. 500 paid by him in January 1908, on his entry as an advocate of the Calcutta High Court and has referred to the proviso to Article 30, Schedule I of Act II of 1899, and to the Madras Full Bench ruling, *In re Parthasaradi* (1).

* Reference from the Board of Revenue under s. 57 (1) of the Indian Stamp Act (II of 1899).

(1) (1884) I. L. R. 8 Mad. 14.

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2. It appears to the Board that exemption could have been claimed and allowed; and they are disposed now to allow a refund under section 52 (a) of the Act. But, as the matter is of importance and as it touches a function of officers of the Hon'ble High Court, the Board think it right to refer the case for the decision of the Court under section 57 (1) of the Act.

W. C. MACPHERSON,

Member of the Board of Revenue, L. P."

The exemption to Article 30, Schedule I of the Indian Stamp Act of 1899, is as follows :—

“Entry of an advocate, vakil or attorney on the roll of any High Court when he has previously been enrolled in a High Court.”

Mr. C. C. Ghose, for *Mr. Baxter*, the petitioner. It is submitted that this matter falls within the terms of the exemption to Article 30, Schedule I of the Indian Stamp Act of 1899. The exemption must be read in its ordinary meaning. The petitioner, having been previously enrolled in the Calcutta High Court as an attorney, was exempted from the payment of any fee on his entry on the roll as an advocate : *In re Parthasaradi* (1). The petitioner is entitled to a refund of the sum of Rs. 500 which he paid on his enrolment as an advocate.

The judgment of the Court was delivered by

HARINGTON A.C.J. We agree in the view expressed by the Board that exemption could be claimed and allowed in the case of *Mr. Baxter*. We accordingly direct that the sum of Rs. 500 paid by him when he was enrolled as an advocate of this Court be refunded.

Attorneys for the petitioner : *B. N. Bose & Co.*

(1) (1884) I. L. R. 8 Mad. 14

J. C.

APPELLATE CIVIL.

Before Mr. Justice Sharfuddin and Mr. Justice Cox.

GOPAL CHANDRA BHATTACHARJEE

v.

THE SECRETARY OF STATE FOR INDIA.*

1909
April 5.

Master and Servant—Misappropriation by Servant—Fraud—Liability of Master for misconduct of Servant—Misappropriation by Employees of Government—Secretary of State, liability of—Principal and Agent.

The rule of law with regard to the liability of the master for misconduct of the servant is that a master is liable for the fraud of his servant committed in the course of his service and for the master's benefit, though it is not necessary that the benefit should accrue to the master; and that a master is not liable for misconduct of the servant committed for the servant's own private benefit.

A cheque was given to the plaintiff by the District Board for repairs done to certain roads. On presentation of the cheque for payment at the Government Treasury Office, the amount was not paid to the plaintiff but was misappropriated by the *poddar* and a *mohurer* employed in the Treasury to their own use. The plaintiff brought a suit for the recovery of the amount against those officers of the Treasury as well as the Secretary of State for India :—

Held, that the Secretary of State was not responsible for the misappropriation by his employees, the misappropriation not being within the scope of the duties entrusted to them. The fraud and misappropriation were not committed either for the benefit of the Secretary of State or for purposes of the agency.

Barwick v. English Joint Stock Bank (1), *Houldsworth v. City of Glasgow Bank* (2), *British Mutual Banking Company, Ltd. v. The Charnwood Forest Railway Co.* (3), *Burmah Trading Corporation, Ltd. v. Mirza Mahomed Ally Sherazee* (4), *McLaren Morrison v. Verschoyle* (5), *Moti Lal Ghose v. Secretary of State for India* (6), *Lall Chand v. The Agra Bank, Ltd.* (7) referred to.

* Appeal from Appellate Decree, No. 1594 of 1907, against the decree of B. K. Mullick, District Judge of Chittagong, dated May 18, 1907, affirming the decree of Hem Chandra Mukerjee, Subordinate Judge of Chittagong, dated June 16, 1906.

(1) (1867) L. R. 2 Exch. 259.

(4) (1878) L. R. 5 I. A. 130.

(2) (1880) L. R. 5 A. C. 317.

(5) (1901) 6 C. W. N. 429.

(3) (1887) L. R. 18 Q. B. D. 714.

(6) (1905) 9 C. W. N. 495.

(7) (1891) L. R. 18 I. A. 111.

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SECOND APPEAL by Gopal Chandra Bhattacharjee, the plaintiff.

This appeal arose out of a suit for the recovery of Rs. 1,091-12-9 by the plaintiff who was a contractor under the District Board under the following circumstances: On the 3rd April 1905, the plaintiff received a cheque for the above amount from the District Board in payment of repairs done to certain roads, and on the same date he presented this cheque at the Accountant's Office at the Chittagong Collectorate. It was duly passed and signed in the account *serishta*. The plaintiff then took the cheque and handed it over to the defendant No. 3, Tripura Charan De, in the Treasury Office. After signing a *khassra* receipt and a book, the plaintiff was asked to come and take the money after a little while, which the plaintiff did, and on going to the defendant No. 2, Anrada Charan De, as the person entrusted to make this payment, he was told that payment had already been made to another man, and he was refused payment. The plaintiff thereupon notified the matter to the Treasury Office and the District Collectorate, and on finding the amount to be paid to him had been misappropriated by the defendants Nos. 2 and 3, brought a suit in the Court of the 1st Subordinate Judge of Chittagong against the Secretary of State, as the first defendant, along with the defendants Nos. 2 and 3, for the recovery of the same, alleging that the defendants Nos. 2 and 3 were acting as agents of the defendant No. 1.

The suit was decreed with costs by both the Courts against the defendants Nos. 2 and 3 and dismissed as against the defendant No. 1. The plaintiff, thereupon, preferred this appeal to the High Court.

Babu Dwarka Nath Chakravarti and Babu Ram Kanta Bhattacharjee, for the appellants.

The Offg. Senior Government Pleader (Babu Umakali Mukerjee), for the Secretary of State.

Cur. adv. vult.

SHARFUDDIN AND COXE JJ. In this second appeal the plaintiff is the appellant, and he instituted the suit under the following circumstances :—

He is a contractor under the District Board of Chittagong, and for some work done by him for the District Board he was given a cheque for Rs. 1,091-12-9 by the Vice-Chairman on the 3rd April 1905. The District Board funds are kept in the Government Treasury at Chittagong. The plaintiff went to the Treasury for the money covered by the cheque. Defendant No. 2 was the head *poddar* in the Treasury and defendant No. 3 was a *mohurer* there. It appears that the cheque was passed by the Accountant on its presentation by the plaintiff and it was then presented by him to the Treasurer who, after obtaining the necessary orders of the Treasury Officer, made it over to defendant No. 3, who in his turn, took plaintiff's signature in a receipt-book and told him to apply a little later to defendant No. 2 for the money. The plaintiff says that a little after he went for the money to the defendant No. 2. But this defendant instead of paying the money told him that it had been paid to the payee. On the above facts, the plaintiff sued the defendants Nos. 2 and 3 for the money alleging that they had in collusion committed fraud and misappropriation. Defendant No. 1, the Secretary of State, is also made a party on the ground that defendants Nos. 2 and 3 were acting as his agents and that they committed fraud and misappropriation in performance of their duty as such.

Both the lower Courts have decreed the suit against defendants Nos. 2 and 3, holding that the misappropriation was committed by them for their own benefit and they were, therefore, liable. But the plaintiff's case as against the Secretary of State has been dismissed.

The plaintiff now appeals to this Court, and on his behalf it has been urged that the defendant No. 1, the Secretary of State, should have been made liable and the Court below was wrong in holding that the misappropriation by defendants Nos. 2 and 3 was not within the scope of their employment.

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During the course of argument, we have been referred to some English cases by the learned vakil for the appellant. The first authority cited is the case of *Barwick v. English Joint Stock Bank* (1). We find that Willes J. makes the following observations with regard to the liability of the principal: "But with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." The above definition of the liability of the master appears to have been repeatedly referred to and approved of in many subsequent cases; it was cited with approval by Lord Selborne in the case of *Houldsworth v. City of Glasgow Bank* (2).

Another authority to which our attention has been drawn is the case of *British Mutual Banking Company, Ltd. v. The Charnwood Forest Railway Co.* (3). In this case it was held that when a Secretary of the defendants had made untrue answers to enquiries for his own benefit, the defendants were not liable, and Lord Esher in delivering judgment in the above case observes that "although what the Secretary stated related to matters about which he was authorized to give answers, he did not make the statement for the defendants but for himself. He had a friend whom he desired to assist and could assist by making false statements and as he made them in his own interest or to assist his friend, he was not acting for the defendants. The rule has often been expressed in the terms that to bind the principal the agent must be acting for the benefit of the principal."

Another case cited was the case of *Burmah Trading Corporation, Ltd. v. Mirza Mahomed Ally Sherazee* (4). In this case

(1) (1867) L. R. 2 Exch. 259.

(3) (1887) L. R. 18 Q. B. D. 714.

(2) (1880) L. R. 5 A. C. 317.

(4) (1878) L. R. 5 I. A. 130.

the principle laid down by Willes J. above quoted was referred to and approved.

We find that the above cases have been fully discussed in the case of *McLaren Morrison v. Verschoyle* (1), and there also Stanley J. has approved of the principle of the liability of the master as laid down in the above case.

In the case of *Moti Lal Ghose v. Secretary of State for India* (2), it was held that where the act complained of was done by a Government official occupying such a position that for all practical purposes the Government had no control over him and the Government did not cause or authorize or adopt such act and gained no profit from it, the Government cannot be made liable.

The next case on the point is the case of *Lall Chand v. The Agra Bank, Ltd.* (3). In this case their Lordships of the Privy Council thought that the servant might *bonâ fide* have paid the money to the wrong person. This would have been within the purposes of the agency and the principal would be liable. But the case does not lay down that the holder of a cheque can, in all cases, sue a banker for the money covered by the cheque independently of any conversion.

From a perusal of the reports of the above cases, it seems to us clear that the true rule of law with regard to the liability of the master for the misconduct of the servant is that a master is liable for the fraud of his servant committed in the course of his service and for the master's benefit, and it is not necessary that the benefit should accrue to the master; and that a master is not liable for the misconduct of the servant committed for the servant's own private benefit.

The present case has been brought against the Secretary of State because the amount was misappropriated by the second and third defendants and he is responsible for their actions. This is clearly not so. Misappropriation was not within the scope of the duties entrusted to the defendants

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(1) (1901) 6 C. W. N. 429.

(2) (1905) 9 C. W. N. 405.

(3) (1891) L. R. 18 I. A. 111.

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Nos. 2 and 3. These defendants did not commit the fraud and misappropriation either for benefit of the Secretary of State or for purposes of the agency.

It has been argued on behalf of the appellant that although the first defendant, the Secretary of State, may not be liable for the fraud of the other two defendants, yet he is liable to pay the amount of the cheque, when he had funds of the District Board in hand at the time of the presentation of the cheque. This was not the basis of the suit and cannot now be dealt with. Nor, is it at all clear that any such suit would lie, or that there is any privity between the holder of a cheque and a banker, such as would enable the former to sue the latter for the money covered by the cheque, except in the form of damages for misappropriation.

In the above circumstances, we think that the judgment of the lower appellate Court is correct and we, therefore, dismiss the present appeal with costs.

Appeal dismissed.

O. M.

APPELLATE CIVIL.

Before the Hon'ble Mr. Harington, Acting Chief Justice, and Mr. Justice Mookerjee.

GOLAP KUMARI

v.

GANESH CHANDRA MITRA.*

1909

April 6.

Privy Council Appeal—Security for Costs of Respondents—Government Promissory Notes at their nominal value, whether acceptable—High Court Rules (Appellate Side). Part II, Chapter IV. Rule XX—Practice.

A deposit of Government Securities amounting to Rs. 4,000 at their nominal value, comes within the express words of Rule XX, Part II Chapter, IV of the High Court Rules, requiring the appellant to deposit Government Securities "to the extent of Rs. 4,000" for costs of the respondent in an appeal to His Majesty in Council.

APPLICATION on behalf of Bibi Golap Kumari Saheba, the appellant before His Majesty in Council.

Leave having been granted to the petitioner to prefer an appeal to His Majesty in Council, under the High Court Rules (Appellate Side), Part II, Chap. IV, Rule XX, she was required to deposit Government Securities to the extent of Rs. 4,000 for the costs of the respondent. Accordingly the petitioner tendered at the office four pieces of $3\frac{1}{2}$ per cent. Government Promissory Notes of the nominal value of Rs. 1,000 each, but the office refused to accept the said notes as sufficient, and demanded an additional sum of Rs. 300 to make up for the discount at which such notes were then selling in the market.

The petitioner prayed that the said Promissory Notes might be accepted at their nominal value as sufficient security for costs of the respondent.

Babu Braja Lal Chuckerbutty, for the petitioner.

Babu Nalini Ranjan Chatterjee, for the opposite party.

* Application in the matter of the Privy Council Appeal No. 46 of 1908.

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HARINGTON A.C.J. AND MOOKERJEE J. We think that the deposit of Government Securities amounting to Rs. 4,000 comes within the express words of the rule requiring the deposit of Government Securities "to the extent of Rs. 4,000." The security must be accepted.

Application allowed.

S. C. G.

APPELLATE CIVIL.

Before Mr. Justice Chitty and Mr. Justice Vincent.

1909
 April 14.

PURNA CHANDRA MANDAL

v.

ANUKUL BISWAS.*

Sale in execution—Application to set aside sale—Limitation—Fraud—Onus of proof—What to prove exactly—Limitation Act (XV of 1877), s. 18.

When a suit or application is, on the face of it, barred by limitation, it is for the plaintiff or applicant to satisfy the Court of circumstances which would prevent the statute from having its ordinary effect.

In the case of an application for setting aside a sale in execution, where the petitioner relied upon the provisions of s. 18 of the Limitation Act, 1877:—

Held, that it was incumbent upon him to show that not only had he no knowledge of the sale until some date within three years of his application, but that he was kept from that knowledge in the manner and by the act of the person specified in that section.

SECOND APPEAL by Purna Chandra Mandal, the auction-purchaser.

This appeal arose out of an application of a judgment-debtor under sections 244 and 311 of the Civil Procedure Code for setting aside a sale held in execution on grounds of non-publication of writ of attachment or the sale proclamation on the property sold, fraud and inadequacy of price. Of the

* Appeal from order, No. 383 of 1908, against an order of Purna Chandra De, Subordinate Judge of Khulna, dated May 30, 1908, reversing an order of Ashutosh Goswami, Munsif of Satalbira, dated Aug. 21, 1907.

the opposite parties who contested the application, the auction-purchaser contended, *inter alia*, that the sale having taken place on the 17th February 1896, and the application to set aside the sale having been made on the 15th April 1907, the application was barred by limitation under Article 178 of the Second Schedule of the Limitation Act. The allegation of the petitioner on this point was that he was kept out of the knowledge of the sale in question, and that he became aware of it only on the 14th March 1907.

The Munsif disbelieved the allegations of fact of the petitioner and dismissed the application, without going into the question of limitation, it being unnecessary to do so. On appeal, the Subordinate Judge reversed the decision of the Munsif, as he found in favour of the petitioner on the ground of fraud.

The auction-purchaser, thereupon, appealed to the High Court.

Babu Sarat Chandra Roy Chaudhuri (Babu Charu Chandra Bhattacharji with him), for the appellant. The application is under section 244 of the Civil Procedure Code, on the ground that the sale was brought about fraudulently and that the applicant became aware of the sale only a month before the date of the application. Under the recent rulings, Article 178 and not Article 166 of the Second Schedule of the Limitation Act applies. The applicant is, therefore, entitled to only three years. He is entitled to more time if he can show that section 18 of the Limitation Act applies to his case, *viz.*, that after the sale, he was kept out of his knowledge of the same by the fraud of the auction-purchaser against whom he seeks relief. There is no evidence exactly on this point. The Subordinate Judge should have come to a distinct finding on this point.

Babu Sarat Chandra Ghose, for the respondent. The applicant has his remedy under section 244, Civil Procedure Code, whether the sale was brought about by the fraud of the decree holder or of the auction-purchaser. He is entitled to

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have three years' time from the date of his knowledge. Finding of fraud on the part of *either* is quite enough. There is a clear finding to that effect: *Rahimbhoy Habibbhoy v. Turner* (1), *Bhuban Mohan Pal v. Rajah Peary Mohun Mukerjee* (2) and *Khirode Sundari Debi v. Jnanendra Nath Pal* (3).

Cur. adv. vult.

CHITTY AND VINCENT JJ. This second appeal arises out of an application made by a judgment-debtor to set aside a sale in execution. The sale took place as long ago as 17th January 1896. This judgment-debtor, Anukul Biswas, applied to the Court to have the sale set aside on the 15th April 1907, on the ground of fraud. The first Court came to the conclusion that the petitioner had utterly failed to prove that there was any fraud or collusion on the part of the decree-holders or the auction-purchaser in bringing the property to sale, and it accordingly dismissed the application. On appeal, the Subordinate Judge found that there was fraud on the part of the decree-holders, and that they had got the property sold to Purna Chandra Mandal, the present appellant, in collusion with certain judgment-debtors, and he accordingly set aside the sale.

So far as the findings of fact go with regard to the question of fraud, it is not necessary for us in this appeal to consider them. The sole question raised before us is whether the application is not barred by the statute of limitation. Taking the application by the judgment-debtor, Anukul Biswas, to be one under Article 178 of the Second Schedule of the Limitation Act, the petitioner would have, in ordinary circumstances, three years from the date when his right to apply accrued, within which to make his application. He did not actually make it until more than eleven years from the date of the sale, which was, of course, the date on which his right to apply accrued. In the first Court, it was unnecessary, in the view that the Munsif took of the evidence, to go into this question

(1) (1892) I. L. R. 17 Bom. 341.

(2) (1899) 3 C. W. N. 399.

(3) (1901) 6 C. W. N. 233, 238.

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of limitation ; but, when the matter came before the learned Subordinate Judge and he was inclined to take a different view of the facts regarding the sale, it was obviously necessary for him to see whether the application of this judgment-debtor was, in fact, within time. The question of limitation depends upon what has taken place after the date of the sale, with regard to the knowledge of the judgment-debtor concerned. Section 18 of the Limitation Act provides that when any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right, the time limited for instituting a suit or making an application (a) against the person guilty of the fraud or accessory thereto, shall be computed from the time when the fraud first became known to the person injuriously affected thereby. The three years would, in ordinary circumstances, have expired in January 1899. It was, therefore, incumbent on the petitioner to satisfy the Court that he had been by means of fraud kept from the knowledge of the sale having taken place to his prejudice, and further he had to show with regard to the auction-purchaser, the appellant in this case, that he, the appellant, was either himself guilty of the fraud or an accessory thereto. In order to ascertain whether the judgment-debtor had proved this, we kept the case back so that we might look through the evidence. Having been carefully through the evidence, we find that there is not a suggestion of any evidence having been directed at all to this point nor is there any finding upon it by either of the lower Courts. There is some evidence of fraud in bringing about the sale with which the lower Court was not satisfied, but on which the learned Subordinate Judge eventually set aside the sale, but as to the fact of the sale having been kept from the knowledge of the petitioner by fraud, there is, as we have said, no evidence at all. Under these circumstances, it is obvious that the application of the petitioner must be regarded as barred by limitation. When a suit or an application is, in the face of it, barred, it is for the plaintiff or the applicant to satisfy the Court of circumstances which would prevent the statute from having its ordinary effect, and

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it is incumbent in this case upon the petitioner, the judgment-debtor, to show that not only had he no knowledge of the sale until some date within three years of his application, but that he was kept from that knowledge in the manner and by the act of the person specified in section 18 of the Limitation Act. We may say that it seems to us almost incredible that this judgment-debtor, Anukul Biswas, knew nothing about the sale of his own land, including his homestead, which had taken place eleven years before he made his application. Not only were there suits for rent against some of the tenants, but there was another unsuccessful application by his co-judgment-debtors to set aside this very sale. Under these circumstances, we think that the order of the learned Subordinate Judge cannot be sustained, the application being barred by limitation. The appeal is, therefore, allowed, the order of the lower appellate Court is set aside and the application of this judgment-debtor is dismissed. The appellant must have his costs in this Court as well as in the lower Courts.

Appeal allowed.

S. M.

APPELLATE CRIMINAL.

*Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and
Mr. Justice Carnduff.*

GOURIDAS NAMASUDRA

v.

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1908
Nov. 21.

Dying declaration—Admissibility of petition of complaint and examination of complainant on oath as dying declarations—Record and mode of proof of such statements—Evidence Act (I of 1872) ss. 32, cl. (1), and 91—Criminal Procedure Code (Act V of 1898) s. 200—Assault by several but fatal blow by some one of them—Liability of each accused—Penal Code (Act XLV of 1860) ss. 34, 326.

A petition of complaint and the examination of the complainant on oath under section 200 of the Criminal Procedure Code are admissible as dying declarations under section 32, clause (1), of the Evidence Act, and are not, as such, matters required by law to be reduced to the form of a document within section 91 of the Evidence Act so as to exclude parole evidence of their terms.

The statement admissible in evidence, when made in the absence of the accused, is the oral statement of the deceased, and not the record of it; and such oral statement must be proved by the person who recorded it or heard it made.

Empress v. Samiruddin (1) and *King-Emperor v. Mathura Thakur* (2) followed.

Where several accused persons struck the deceased several blows, one of which only was fatal, and it was not found who struck the fatal blow, it was held that, in the circumstances, it could not be said that those who did not strike the fatal blow contemplated the likelihood of such a blow being struck by the others in prosecution of the common object, and that they were all guilty under section 326, and not under section 302, of the Penal Code.

THE appellants, Gouridas, Gurudas and Girish, were tried by the Sessions Judge of Tipperah with the aid of Assessors, the first two being charged under section 302 of the Penal Code and the third under section 323. The Assessors found them not guilty, one of them being of opinion that the deceased

* Criminal Appeal, No. 703 of 1908, against the order of A. H. Cuming, Sessions Judge of Tipperah, dated July 22, 1908.

(1) (1881) I. L. R. 8 calc. 211.

(2) (1901) 6 C. W. N. 72.

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might have received his wounds in the fight between himself and Nanda and Sita, as alleged by the defence. The Sessions Judge, disagreeing with the Assessors, convicted the appellants, and sentenced Gouridas and Gurudas to transportation for life, and Girish to three months' rigorous imprisonment, by his judgment dated the 22nd July 1908.

The prosecution story was that the deceased, Saheb Ali, went to the house of Ali Bux on the 28th May, 1908, and started for home after a while with one Joynuddi. While going along an *ail* dividing some paddy fields, the three appellants, with one Nanda who is absconding, came from the north and attacked Saheb Ali, but, on Joynuddi crying out, people arrived and the accused ran away. Next morning Saheb Ali went to Brahmanberia, some three and a half miles distant, and filed a petition of complaint before the Deputy Magistrate, who examined him on oath, recorded his statement and sent him to hospital, where he died on the 31st. Gouridas and Gurudas each pleaded *alibi*. Girish admitted that a quarrel had taken place between him and the deceased over damage done to his crops by the latter's cattle, but denied any assault on his own part. The defence produced witnesses to prove that Nanda and Sita had, at the time of the quarrel, come with Girish and beaten the deceased.

The petition of complaint, Ex. (1), was proved by Saheb Ali's muktair's *mohurrir*, who had prepared it under personal instructions, and who deposed that Saheb Ali made a statement to him which was correctly recorded in the petition. The Deputy Magistrate who had examined the deceased, was not called to prove his examination, Ex. (1a), but the magisterial record was filed at the trial by the prosecution.

Babu Dasharathy Sanyal and *Babu Debendra Nath Bhatta-charjee*, for the appellants.

Babu Atulya Charan Bose, for the Crown.

MACLEAN C.J. AND CARNDUFF J. The appellants before us are three *namasudras*, Gouridas, Girish and Gurudas, the

brother of Girish. They have been convicted by the Sessions Judge of Tipperah, who, differing from both the Assessors, has found Gouridas and Gurudas guilty of the murder of one Saheb Ali, and Girish guilty of having caused simple hurt to the deceased. Girish has been sentenced to three months' rigorous imprisonment under section 323 of the Indian Penal Code, while the sentence on each of his companions is transportation for life under section 302.

Two points of law have been raised, and these we will dispose of at once.

Saheb Ali was attacked and injured at Srirampore on the 28th May last. On the 29th he went to Brahmanberia and lodged a petition of complaint before the Magistrate, who examined him on oath, recorded his statement in compliance with the provisions of section 200 of the Criminal Procedure Code, and sent him to hospital, where he died on the 31st. The statement recorded by the Magistrate has been treated as a "dying declaration," and it has been proved by the production of the magisterial record, the learned Sessions Judge holding that, under section 91 of the Indian Evidence Act, no other evidence was admissible. In this connection it is contended (i) that the statement was a complaint and, therefore, not a "dying declaration," and (ii) that, if it was admissible as a "dying declaration," the Magistrate ought to have been examined to prove its contents.

In the first contention we find no substance. The statement to the Magistrate was clearly admissible under section 32, clause (1), of the Evidence Act, as having been made by the deceased as to "the circumstances of the transaction which resulted in his death;" and it did not cease to be such a statement because it contained a complaint and had, in the circumstances, to be recorded under section 200 of the Criminal Procedure Code.

As regards the second point, however, we are disposed to agree with the learned pleader for the appellants. A "dying declaration," as such, is not a "matter required by

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law to be reduced to the form of a document ; ” therefore, section 91 of the Evidence Act ought not to have been applied ; and, as was held by this Court in *Empress v. Samiruddin* (1) in 1881, and in *King-Emperor v. Mathura Thakur* (2) more recently, the precise statement made ought to have been proved by the Magistrate who recorded it, or by someone who heard it. We think, then, that Ex. (1a), the recorded complaint, must be excluded. But there remains the statement contained in the written petition of complaint, Ex. (1), prepared by the muktear’s *mohurrir* (prosecution witness No. 4), who swears that the deceased made a statement in his presence and that it was “ correctly put down ” in that petition. As this statement and that subsequently made to the Magistrate are practically the same, the exclusion of the latter does not affect the case.

As to the facts, the case for the prosecution is that the deceased was waylaid on the 28th May, and assaulted by the three appellants (and a fourth *namasudra*, Nanda, who appears to have absconded) out of revenge, Saheb Ali’s brother, Ahab, having assaulted Girish a few days earlier on Girish’s trying to impound Ahab’s cattle for trespassing on his field. The scene of the occurrence was laid at a short distance from Girish’s field.

The defence is that the deceased and his brother allowed their cattle to trespass on Girish’s field on the 28th May, that Girish seized the cattle, and that the occurrence took place there in consequence of the intervention of the deceased and his friends. A vague counter-complaint to this effect was lodged by Girish on the 29th, and witnesses were produced at the trial to develop it. According to them the absconder, Nanda, and someone called Sita, came to succour Girish, and it was they *alone* who assaulted Saheb Ali. Girish was present, but took no part in the assault ; Gouridas and Gurudas were not there at all ; and, while one witness admits that he saw blood on Saheb Ali’s person, all profess to have no idea how the deceased came by his injuries.

(1) (1881) I. L. R. 8 Calc. 211.

(2) (1901) 6 C. W. N. 72.

The learned Sessions Judge, for what seem to us to be very good reasons, doubted the origin of the occurrence alleged by the prosecution, and came to the conclusion that it took place, as suggested by the defence, on or near Girish's field owing to the trespass of Saheb Ali's cattle. That all three appellants assaulted the deceased, and that *Gouridas and Gurudas both struck him on the head with *lathis*, he found fully proved, and he convicted these two of murder, inferring that they must have intended to cause bodily injury likely to result in death.

The assault and its consequences may be said to be admitted, and we agree with the learned Sessions Judge in thinking that there can be no reasonable doubt as to the three appellants having taken part in it. The evidence implicating them is ample. First, there are three eye-witnesses—Joynuddi, the deceased's youthful nephew, Buksha Ali, a cousin, and Cherag Ali, who seems to be independent and was cultivating his field in the vicinity at the time. Joynuddi was apparently not mentioned to the police by the others in the first instance, but that is not a sufficient reason for disbelieving him, especially as it is in evidence that he ran away to some distance when his uncle was attacked. Next, there is the statement made by the deceased on the following day in the presence of the *mohurrir* and proved by the latter. Then there is the corroborative evidence of the Civil Hospital Assistant, showing that the deceased received six injuries, including three severe injuries on the head, one of which fractured the frontal bone and was the cause of death. The blow on the back of the head, he deposed, "would not of itself have been fatal." Finally, there is the difficulty of accepting the theory of the defence and understanding why Saheb Ali should have falsely charged Gouridas and Gurudas, instead of the absent Sita.

In the case of Girish, therefore, we see no reason to interfere and dismiss his appeal.

As regards the other two appellants there are considerations which lead us to take a view of their action different from that taken in the Court below. Only one blow was

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fatal, and the learned Sessions Judge has not been able to find who struck it. Recourse has, therefore, to be had to section 34 of the Indian Penal Code, but in the circumstances of this case we are not prepared to hold that the appellant who did not strike the fatal blow, must have contemplated the likelihood of such a blow being struck by the others in prosecution of the common object of punishing the deceased for his interference and the damage done by his cattle. Moreover, the deceased was in the wrong, and the appellant, on whose behalf the others intervened, has escaped with only three months' imprisonment. We think that the ends of justice will be fully met by convicting Gouridas and Gurudas under section 326 of the Indian Penal Code, and sentencing each to seven years' rigorous imprisonment.

The Sessions Judge seems to have held that the proviso to section 162 of the Code of Criminal Procedure debarred the prosecution from proving by oral evidence a previous statement made to the police by one of the witnesses for the defence in order to impeach that witness' credit. It is not necessary for us to discuss the question thus raised here, especially as we have just had occasion to deal with it in *Fanindra Nath Banerjee v. Emperor* (1).

(1) (1908) I. L. R. 36 Calc. 281.

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APPELLATE CIVIL.

Before Mr. Justice Doss and Mr. Justice Richardson.

GOLAM MOHIUDDIN HOSSEIN

v.

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1909

March 11.

Hât—Mortgage—Whether the rents and profits of hât could be mortgaged—Transfer of Property Act (IV of 1882), s. 58—General Clauses Act (I of 1868), s. 2, cl. (5).

The rents and profits derivable from a *hât* can be validly mortgaged.

Surendro Prosad Bhattacharji v. Kedar Nath Bhattacharji (1), *Bungshodhur Biswas v. Mudhoo Mchuldar* (2), *Surendra Narain Singh v. Bhai Lal Thakur* (3) and *Sikandar v. Bahadur* (4) referred to.

APPEAL by the defendants, Syed Golam Mohiuddin Hossein and others.

This appeal arose out of an action brought by the plaintiff to recover possession of a *hât* called Alamdanga *hât*.

The plaintiff's allegation was, that on the 19th November 1898, one Syed Ashgar Reza executed a registered mortgage bond in favor of Ram Chandra Babu, whereby amongst other properties this *hât*, which formerly lay in Alamgunge but located within the compound walls of a certain Imambara, was also mortgaged. Ram Chandra Babu brought a suit upon his mortgage bond against the mortgagor and obtained a decree on the 30th March 1904 directing the sale of the mortgaged properties. In execution of that decree the plaintiff, Musamat Parbati, purchased the said *hât*, on the 7th June 1905, which was described as *hât* Alamgunge situated within the compound walls of the Imambara. On the 15th September 1905, the plaintiff obtained possession of the *hât* from the Court.

* Appeal from Original Decree, No. 241 of 1907, against the decree of Surya Narain Das, Subordinate Judge of Purneah, dated March 27, 1907.

(1) (1891) I. L. R. 19 Calc. 8.

(3) (1895) I. L. R. 22 Calc. 752.

(2) (1874) 21 W. R. 383.

(4) (1905) I. L. R. 27 All. 46.

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The defendants, on the 9th January 1906, in execution of a certificate issued, after the mortgage suit, by the Collector under the Public Demands Recovery Act against the said Syed Ashgar Reza, purchased his *pucca* and *kacha* dwelling house with its materials and furniture together with certain lands including the land whereon the said dwelling house was erected, and in March 1906 obtained possession of these properties.

The plaintiff stated that although the Imambara and the *hât* held within its compound, were not included in the certificate sale of the Collector, yet the defendants under the colour of their purchase dispossessed her in April 1906, and hence the suit.

The defendants pleaded, *inter alia*, that the mortgage deed did not cover the land of the Imambara on which the *hât* was held; that they having purchased the land of the Imambara were entitled to claim the said *hât* as benefit arising out of land.

The Court of first instance overruled the objections of the defendants, and decreed the plaintiff's suit.

Against this decision the defendants appealed to the High Court.

Moulvi Shamsul Huda (*Babu Hemendra Nath Sen* and *Babu Jnan Ranjan Chatterjee* with him), for the appellants. The mortgage is not a valid one, as it is not of any specific immoveable property. In the deed the boundaries of the *hât* are given as it existed at Alamgunge. At the time of mortgage the *hât* was being held upon the land in dispute. There can be no roving mortgage attaching on one property at one time and on another property at another time. The identity of the Alamgunge *hât* is destroyed as soon as it shifted from one place to another. The land would no longer be the same, nor the shops, nor the articles sold. The mere name cannot establish the identity.

Babu Nalini Ranjan Chatterjee (*Moulvi Mahomed Tahir* with him), for the respondent. The mortgage of a *hât* is valid in law. It is a transfer of rents and profits arising out of the land. The *hât* is specific in the deed. Having regard to the terms of the deed the identity of the *hât* is established:

Surendra Narain Singh v. Bhai Lal Thakur (1), *Sikandar v. Bahadur* (2), *Bungshodhur Biswas v. Mudhoo Mohuldar* (3) and *Surendro Prosad Bhattacharji v. Kedar Nath Bhattacharji* (4); see also Jones' Treatise on the Law of Mortgages, 6th Edition, section 140.

Moulvi Shamsul Huda, in reply.

Cur. adv. vult.

Doss J. This appeal arises out of an action to recover possession of a certain *hât* called Alamgunge *hât*.

On the 19th November 1898, corresponding to the 4th Aghran 1306, one Syed Ashgar Reza executed a mortgage bond in favour of Ram Chandra Babu whereby amongst other properties he mortgaged the *hât* in suit. On the 30th March 1904, the mortgagee obtained a mortgage decree directing the sale of the mortgaged properties. On the 7th June 1905, the *hât* was sold and purchased by the plaintiff for Rs. 16,000. She duly obtained possession of this *hât* on the 15th September 1905. Subsequently on the 9th January 1906, the dwelling house of Syed Ashgar Reza, together with the adjoining site on which the *hât* is held, was sold under a certificate issued under the Public Demands Recovery Act and was purchased by the defendants. In March 1906, the defendants obtained possession of the properties purchased by them and thereafter dispossessed the plaintiff from this *hât*. In the month following, the plaintiff brought the present action for possession of the *hât*.

The defendants alleged that under their purchase they were entitled not only to the site but also to the *hât* which was held upon it.

The learned Subordinate Judge has, upon the facts which are practically admitted, given the plaintiff a decree.

The first question which arises in this appeal is whether a *hât* can be the subject of a valid mortgage.

What the mortgagor really transfers, are the rents and profits issuing out of the land, or, in the words of the General

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(1) (1895) I. L. R. 22 Calc. 752.

(2) (1905) I. L. R. 27 All. 462.

(3) (1874) 21 W. R. 383.

(4) (1891) I. L. R. 19 Calc. 8.

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Clauses Act used in the definition of “immoveable property,” “benefits arising out of land.” There is no express authority upon this point, but the principle upon which depends the solution of this question is well-settled. There can be no doubt that everything which is capable of being transferred may form the subject of a valid mortgage. Story in his *Equity Jurisprudence* in section 1021, says: “As to the kinds of property which may be mortgaged, it may be stated that, in equity, whatever property, personal or real, is capable of an absolute sale, may be the subject of a mortgage Therefore rights in remainder and reversion, possibilities coupled with an interest, rents, franchises and choses in action are capable of being mortgaged.” See also Jones on Mortgage, 6th Edition, section 140.

It is, therefore, clear that rents and profits may be transferred by way of mortgage apart from the land itself.

If any further authority is needed in support of this proposition, it is to be found in the observations of the learned Judges of this Court in *Surendro Prasad Bhattacharji v. Kedar Nath Bhattacharji* (1). There the question was whether the *sayer* compensation paid by Government for the abolition of a *hât*, which existed prior to the decennial settlement, was capable of being mortgaged. It was held that such compensation did not partake of the nature of *malikana*, or could not in any sense be regarded as rent or profits of the land and that, therefore, it could not be mortgaged. The learned Judges distinguished the *sayer* compensation, from rent or profits of land. They thus observed:—

“These duties, that is, the duties of which the *sayer* compensation was an instance, it will be observed, were in no sense rent or profits which the owner of a *hât* or bazar was entitled to receive for the use of land or for houses, shops or other buildings erected thereupon” clearly indicating thereby that the rents or profits receivable by the owner of a *hât* or bazar for the use of land or for houses or shops erected on it, can form the subject of a valid mortgage.

(1) (1891) I. L. R. 19 Calc. 8.

In *Bungshodhur Biswas v. Mudhoo Mohuldar* (1), the question was whether a lease could be given of the profits of a *hât*. The learned Judges said: "The collections which the plaintiff let in farm to the defendants are not, it seems to us, in the nature of internal duties. They are merely in the nature of rent which the owner of the land receives from persons who go to sell goods on his land in the shape of a part of the proceeds of sale, instead of a fixed monthly or yearly payment." If the rents or profits of a *hât* can form the subject of a valid lease, there is no reason why a mortgage of such rents or profits cannot be given.

In *Surendra Narain Singh v. Bhai Lal Thakur* (2), the validity of a lease of a *hât* was assumed and the question was whether registration of such a lease was compulsory. It was held that a *hât* was a benefit arising out of land and, therefore, within the definition of immoveable property as given in section 2, clause 5 of the General Clauses Act (I of 1868).

Similarly in the case of *Sikandar v. Bahadur* (3), the validity of a lease of the right to collect market dues was assumed and it was held that such market dues were in the nature of benefits arising out of land and, therefore, registration of the lease was necessary.

These authorities are, in my opinion, sufficient to establish the proposition that the rents and profits derivable from a *hât* can be validly mortgaged.

But it was contended further on behalf of the appellant, that the nature of the *hât* is so peculiar that the mortgage of it cannot be valid according to law.

In the mortgage bond the description of the *hât* is as follows:—"And the said *hât* called Alamgunge used formerly to be held in Alamgunge and it has now been removed by me from there and established in the compound wherein my *masjid*, &c., stand and it is my intention to remove this *hât* from that compound and establish it elsewhere; so I do hereby also mortgage and pledge 16 annas of the said *hât* Alamgunge and the

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(2) (1895) I. L. R. 22 Calc. 752.

(3) (1905) I. L. R. 27 All. 462.

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mortgage under this bond will hold good in respect of the *hât* called Alamgunge under any circumstance and every place whether it be in that compound where it is now held or any other place where it may be established and the said *hât* will be sold by auction without any objection on the ground that the site of the *hât* has been changed. Although the boundaries of the said *hât* which have been fixed from formerly within Alamgunge, are herein given still as set forth above, the boundaries of the said *hât* shall be considered to be of the place where it may be held and in case of its being sold by auction, it shall be sold with those boundaries."

It is clear from these words that the mortgage was of *hât* Alamgunge held on the site where it was held at the time of the mortgage, with a further covenant that the mortgagee should have the same right over the *hât* on whatever site it might thereafter be held, that is, even if it were removed to some other site situated on the property of the mortgagor. Whether this further covenant is valid or not, as between the mortgagor and the mortgagee or between the purchaser of the rights and interests of the mortgagor at an execution sale and the mortgagee, it is unnecessary to consider; because the *hât* is still being held on the site where it used to be held at the time of the mortgage. There can be no doubt that the mortgage of the *hât* now held on the same site where it used to be held at the time of the mortgage and at the time of the sale is separable from the further covenant to which I have just referred and is valid in law.

It follows, therefore, that the purchase of the defendant is subject to the purchase by the plaintiff at the sale in execution of the mortgage in favour of Ram Chandra Babu, and the plaintiff is entitled to have possession of the *hât*.

For these reasons, the judgment of the Court below is affirmed and this appeal is dismissed with costs.

RICHARDSON J. I agree.

Appeal dismissed.

ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

BHOLARAM CHOWDHRY

v.

THE CORPORATION OF CALCUTTA.*

1909

March 22.

Calcutta Corporation—Mandamus, action for—Calcutta Municipal Act (Beng. III of 1899), ss. 9, 14, 95, 371, 375, 377—Corporation, rights of—Permission to erect Masonry Building—Specific Relief Act (I of 1877), s. 45.

There is no provision under the Calcutta Municipal Act, either express or implied, which gives the Calcutta Corporation any control over the General Committee in matters specifically delegated by the Act to the General Committee. The Chairman has the right to reject or approve any plan submitted, and an appeal may be made to the General Committee whose decision is final. The Corporation has no jurisdiction to approve or reject any plan.

No action in the nature of a mandamus lies against the Corporation to compel them to approve any plan for making additions or alterations to buildings. The plaintiff's remedy in such a case is against the General Committee or Chairman under section 45 of the Specific Relief Act.

THIS was a suit brought by the plaintiff against the Corporation of Calcutta for a declaration that the refusal to give sanction to the plaintiff to make certain additions and alterations to his building was irregular, illegal and wrongful, and that he was entitled to have such sanction; and, further, for an injunction restraining the Corporation from causing portions of his building to be demolished and from further harassing the plaintiff with prosecutions for alleged breach of the Building Regulations, and also that the Corporation be directed to pay to the plaintiff Rs. 3,000 as assessed damages.

The facts of the case are as follows:—The Corporation of Calcutta required various quantities of land in Barra Bazar and other localities for the purpose of opening out a new thoroughfare to be called Harrison Road. The lands so acquired included lands outside the alignment of the proposed Harrison Road, technically called surplus lands, which were

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intended to be sold at a profit on the completion of the proposed road. A portion of the land, afterwards known as No. 199, Harrison Road, up to a depth of about 50 feet from the alignment of the Harrison Road, formed part of the surplus land acquired. When the surplus lands were sold, the Corporation, through their Chairman, held out an assurance to intending purchasers that the Building Regulations would not be strictly enforced in cases of buildings on the surplus lands. Thereafter the land No. 199, Harrison Road, was, on the 3rd August 1901, purchased by one Sadasuk Kotary at a sale held by the Registrar of the High Court. Sadasuk shortly after his purchase, on the 11th August 1901, submitted a plan to the Corporation with a view to erect a building on the land No. 199, Harrison Road, and on the adjoining land, No. 201, Harrison Road, of which he was also the owner. Pending the sanction of the Corporation which was ultimately given, Sadasuk conveyed the land No. 199, Harrison Road, to the plaintiff for Rs. 88,000 by an agreement of sale dated the 19th May 1902. Subsequently the plaintiff applied for sanction to make certain additions and alterations to his building, but the Corporation refused him sanction. The plaintiff then appealed to the General Committee who, on the 28th January 1908, also refused sanction to him. The defendant Corporation alleged that the plaintiff's building was a domestic building or dwelling house, and as such was subject to the rules and regulations under the Municipal Act.

Mr. B. C. Mitter and Mr. B. L. Mitter, for the plaintiff.

Mr. Stokes and Mr. N. N. Sirkar, for the defendant Corporation.

FLETCHER J. This is a suit brought against the Corporation of Calcutta in substance for a declaration that the refusal to give sanction to make certain additions and alterations to the plaintiff's building has been irregular, illegal and wrongful, and that he is entitled to have such sanction, and for an injunction restraining the Corporation from causing portions

of the plaintiff's building to be demolished and from further harassing the plaintiff with prosecutions for the alleged breach of the Building Regulations as has been done.

This suit is really an action for a mandamus to force the Corporation to sanction certain plans rejected under the provisions of the Calcutta Municipal Act. The Municipal Act of 1899 is not an easy Act to construe in all respects. Section 5 constitutes three municipal authorities carrying out the provisions of the Act, (i) a Corporation, (ii) a General Committee of the Corporation, and (iii) a Chairman of the Corporation.

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The Corporation, which is the largest municipal authority, has certain specific duties allotted to it under the Act. They depend on section 14 chiefly. The general administration of the Act is vested in the Chairman appointed by the local Government. Certain duties are cast on the General Committee. That body is constituted under section 9. Each of the three authorities is independent of the other. In certain respects one requires the sanction of the other to do the acts authorised. It is true that the only body constituted a body corporate is the Corporation. That is a body consisting of the Chairman and 50 Commissioners elected and appointed. The Chairman and the General Committee have control with regard to the approval or refusal of plans under the Building Regulation set out in Schedule 17. Section 371 provides:— "Permission to erect or re-erect a masonry building shall not be given unless and until the Chairman has approved the site on an application sent to him under section 370." The section 375 provides:—"Whenever the Chairman refuses to approve a building-site for a masonry building, or to grant permission to erect or re-erect a masonry building, he shall state specifically the grounds for such refusal, and the applicant may appeal to the General Committee against such refusal." Sub-section (2) provides:—"The decision of the General Committee shall be final." (3) "If the General Committee reject any such appeal, they shall, by written order, specifically state the grounds for such rejection."

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Section 377 gives the grounds on which approval of a site for the erection or re-erection of a masonry building, or permission to erect or re-erect a masonry building may be refused. It is important to call attention to section 95 which provides for a hearing by the Sub-Committee of an appeal from the Chairman for approval of the building plans subject to confirmation by the General Committee.

In this Act I have been unable to find any provision, either express or implied, which gives the Corporation of Calcutta any control over the General Committee in matters specifically delegated by the Act to the General Committee. This Act confers the right to approve or reject plans on the Chairman. Appeal is to the General Committee and that body's decision is final. No appeal lies to the Corporation. The Corporation, so far as the approval or rejection of a plan is concerned, has no jurisdiction in the matter, and it is impossible to say that an action in the nature of a mandamus lies against the Corporation to compel them to approve the plans. The plaintiff has mistaken his remedy. I think the plaintiff's remedy is against the General Committee or Chairman under section 45 of the Specific Relief Act to determine matters referred to them under the Calcutta Municipal Act. It seems to me it would be an anomaly to order the Corporation to do an act which is expressly reserved to the two other municipal authorities under the terms of the Act.

The suit, therefore, fails and must be dismissed with costs on scale No. 2.

Attorney for the plaintiff : *P. N. Sen.*

Attorney for the defendant : *M. L. Sen.*

R. G. M.

APPELLATE CIVIL.

Before Mr. Justice Doss and Mr. Justice Richardson.

MATHEWSON

v.

RAM KANAI SINGH DEB.*

1909

March 11

Lease—Limitation Act (XV of 1877), s. 22—Parties, addition of—Limitation—Mocurrari Lease—Fraud—Suit to recover Possession—Notice to quit—Chutia Nagpur Encumbered Estates Act (VI of 1876), as amended by Act V of 1884, ss. 7, 12, 17, and 18—Manager's power to grant Lease in Perpetuity—Liability, notice of—Specific Performance—Rule against Perpetuities—Covenant running with the Land.

Section 22 of the Limitation Act applies to a case even where a person is not a necessary party, but only a proper party to a suit, and such a person cannot be added as a party after the expiry of the period of limitation as provided for by that section.

Ravji v. Mahadev (1) and *Guruvayya v. Dattatraya* (2) dissented from.

Abdul Rahman v. Amir Ali (3) followed.

In a suit to recover possession of a certain land by setting aside a *mocurrari* lease, granted by the manager under the Chutia Nagpur Encumbered Estates Act (VI of 1876), on the ground that it was obtained by the lessee by fraudulent misrepresentation, it was objected to that a tenancy from year to year was created between the manager and the defendant by the payment and acceptance of rent under the lease, and that, therefore, the suit was not maintainable without a valid notice to quit :—

Held, per Doss J., that the lease being a voidable one, when rent was paid under such a lease, the payment of rent was under the lease, and was in satisfaction of the recurrent obligation arising out of the legal relation created by the lease. So long as the legal relation was not dissolved the obligation to pay rent continued. On the other hand, as soon as that relation was determined, the obligation to pay rent which is dependent on the continuance of such relation ceased ; and the payment of rent made in fulfilment of such obligation must thenceforth necessarily cease to have any legal effect. And, therefore, if the lease was cancelled on the ground of fraud, the lessee could not resist delivery of possession for the demised land to the lessor on the ground that, despite the cancellation and delivery of the lease, there was yet a subsisting tenancy outstanding which entitled him to retain possession of land until such tenancy was determined by proper notice to quit.

* Appeal from Original Decree, No. 390 of 1907, against the decree of Bipin Behari Chatterjee, Subordinate Judge of Purulia, dated July 20, 1907.

(1) (1897) I. L. R. 22 Bom. 672.

(2) (1903) I. L. R. 28 Bom. 11.

(3) (1907) L.I. R. 34 Calc. 612.

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Held, per RICHARDSON J., that having regard to the frame of the suit, notice to quit was unnecessary.

A manager appointed under the Chutia Nagpur Encumbered Estates Act has power to grant a lease in perpetuity with or without fine, only in case money is required for the settlement of debts and liabilities of the proprietor.

A executed in favour of W an *ijara* lease for a term of years; the lease amongst others contained the following covenant on the part of the lessor:—

“If out of the *ijara* mehal you require any land for the purpose of erecting any indigo factory or silk factory or excavating any *bund* or tank, or for construction of any cutchery house, I shall grant you a *mourasi mocrurari pattah* for it on proper rent.”

W on obtaining the lease constructed on a portion of the *ijara* mehal an indigo factory. Subsequently, A's estates were taken over under the Chutia Nagpur Encumbered Estates Act, and the Deputy Commissioner was appointed manager under the Act. The rights and interests of W in the *ijara* lease were assigned to M, who, before the termination of the said lease, applied to the manager for a *mocrurari* lease of the lands on which indigo vats, etc., were erected. The manager with the sanction of the Commissioner of Chutia Nagpur Division executed a *mocrurari* lease in respect of the said lands. On a suit brought by A after the release of the estate from the operation of the Encumbered Estates Act, to recover possession of the lands by setting aside the *mocrurari* lease, *inter alia*, on the ground that the manager had no such power to grant such a lease without the consent of the proprietor:—

Held, per DOSS J. [RICHARDSON J. concurring as to (i) and (ii)] that under the Amending Act (V of 1884),

(i) the manager was entitled to sell or demise in perpetuity without such consent;

(ii) that the mere absence of notice of the debts and liabilities as contemplated by s. 7 of the Act, was not a valid ground for setting aside the lease;

(iii) that the lease was a valid lease, and if a suit for specific performance of the covenant had been brought by M against the manager, it would have been allowed, inasmuch as the covenant did not infringe the rule against perpetuities;

(iv) that there was a substantial part-performance of the covenant for a perpetual lease such as would entitle the covenantee to claim specific performance of the covenant, on the ground that it would be inequitable and fraudulent for the covenantor to refuse to perform the covenant; and

(v) that M was entitled to the benefit of the covenant as it was one running with the land, and that the covenant did not inflict any hardship on A.

Held, per RICHARDSON J., that it was, in the circumstances, unnecessary to consider whether specific performance of the covenant would have been granted.

APPEAL by the defendants, H. Mathewson and the Midnapore Zemindari Co.

This appeal arose out of an action brought by the plaintiff to recover possession of two plots of land on cancellation of a *mourasi mocrurari* pattah granted to defendant No. 1, Mr. Mathewson, by the manager appointed under the Encumbered Estates Act. The allegation of the plaintiff was that his father in consideration of a loan advanced to him by R. Watson & Co., on the 27th February 1883, granted an *ijara* lease for a period of 21 years commencing from 28th September 1882, and terminating on the 29th September 1903, of a large portion of Pergunnah Barabhum save and except certain parts specified in the lease. It was further agreed between the parties that the lessor would grant to the lessee a *putni* lease of a portion of the pergunnah except certain mouzahs during the currency of the lease. The lease contained the following covenant on the part of the lessor: "If out of the *ijara* mehal you require any land for the purpose of erecting any indigo factory or silk factory or excavating any *bund* or tank, or for construction of any cutchery house, I shall grant you a *mocrurari mourasi* pattah for it on proper rent." Messrs. R. Watson & Co. shortly after the execution of the lease, proceeded to construct on a portion of the *ijara* land, which since has borne the name of Shahebdanga, indigo vats, factory buildings, *amlahs'* quarters, servants' quarters, etc.; and about the year 1888 they erected a *pucca* bungalow. On the 8th of March 1885, they in pursuance of the covenant in the lease obtained a *putni* pattah, from the plaintiff's father, of the mouzahs mentioned therein. In March 1899, Pergunnah Barabhum was taken over under the Chutia Nagpur Encumbered Estates Act for the purpose of liquidating debts and liabilities, and the Deputy Commissioner was appointed manager under the Act. By an indenture, dated the 26th May 1890, R. Watson & Co. transferred all their rights and interests in the pergunnah to Messrs. R. Watson & Co., *Limited*, who again by a similar indenture, dated 15th April 1896, re-assigned all their rights and interests to defendant No. 1, H. Mathewson. The plaintiff's father died on the 22nd July 1900. On the 25th of June 1901, Mr. Mathewson applied to the Deputy Commissioner

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for a *mourasi mocrurari* lease of the said Shahebdanga lands. The Deputy Commissioner with the sanction of the Commissioner of the Chutia Nagpur Division, on the 25th May 1903, executed in favor of Mathewson a *mocrurari* lease in respect of 241 bighas and odd cottas of land at an annual rental of 100 rupees. The plaintiff moved the Board of Revenue against the order granting *mocrurari* lease, but his application was rejected. On the 1st October 1905, the estate was released from the operation of the Encumbered Estates Act. On the 24th May 1906, the present suit was brought against defendant No. 1 with regard to 222 bighas out of the lands covered by the *mocrurari* lease. It was alleged in the plaint that they formed part of the lands excepted from the *ijara* lease; that they were used for holding certain religious festivals thereon, and that defendant No. 1 by fraudulently misrepresenting to the Deputy Commissioner that under the terms of the *ijara* lease he was entitled to get a *mocrurari* of these lands, had obtained such lease. As regards the remaining 19 bighas of land it was alleged that it was not required for any of the purposes mentioned in the *ijara* lease.

The defence was, that the suit was not maintainable for want of a notice to quit, that the disputed lands did not form part of the lands excepted from the *ijara* lease, and that the Deputy Commissioner with the sanction of the Commissioner of Chutia Nagpur granted the lease after a full and complete enquiry and after satisfying himself that the leased lands were outside the excepted lands, and that under the terms of the covenant of the *ijara* lease, the lessees were the representatives and were entitled to have a *mocrurari* lease of the disputed land.

On the 17th of November 1906, the plaintiff having applied to the Court that inasmuch as defendant No. 1 had stated in his written statement that he had sold his rights in the property to the Midnapore Zemindari Company, Ltd., that the said Company should be added as a party defendant, the Court passed an order to that effect and directed that summons be issued.

The Court below overruled the objections of the defendant and decreed the plaintiff's suit, but was of opinion that the

defendant was entitled to get compensation in respect of the buildings which had been erected, and the other improvements which had been made during the period of the *ijara* lease, and assessed the compensation at Rs. 5,000. The Court directed that the plaintiff would be entitled to recover possession of the lands in suit on payment by him to the defendant the said sum of Rs. 5,000.

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Against this decision the defendants appealed; and the plaintiff filed a cross-objection.

Mr. Hill (Babu Jogesh Chandra Roy and Babu Ratan Chand Bural with him), for the appellants, raised a preliminary objection that upon a construction of the various sections of the Act (VI of 1876, as amended by Act V of 1884), it was apparent that the Civil Court had no jurisdiction to entertain a suit of the present nature.

The suit was barred as against defendant No. 2, as he was added long after the institution of the suit: *Abdul Rahman v. Amir Ali* (1) and *Ram Kinkar Biswas v. Akhil Chandra Chaudhuri* (2).

He submitted that his client was entitled to a notice to quit; he was not there as a trespasser. As soon as the manager accepted rent from him, he became a tenant from year to year. The acceptance of rent converted him into a tenant: *Lala Majlis Sahai v. Narain Bibi* (3) and *Doe d. Rigge v. Bell and Clayton v. Blakey* (4), Tudor's Leading Cases on Real Property (4th Edition), pages 4, 24.

Plaintiff's case as based on fraud fell to the ground. The Deputy Commissioner says that he gave the lease on the representation that the demised land was included in the *ijara*, and the plaintiff could not set aside the lease on the ground of fraud unless the Deputy Commissioner himself could do so. Besides, no fraud was alleged against the Deputy Commissioner.

Under the Chutia Nagpur Encumbered Estates Act (VI of 1876), as amended by Act V of 1884, the entire management

(1) (1907) I. L. R. 34 Calc. 612.

(2) (1907) I. L. R. 35 Calc. 519.

(3) (1902) 7 C. W. N. 90.

(4) (1793) 2 Sm. L. Cas. 119, 128.

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of the estate was vested in the manager, and the manager had ample power to grant the lease under section 17 of the Act. Sections 9, 12, 16 and 18 of the Act and also section 3, clause (a), were referred to.

The covenant was one running with the land and not a personal covenant. Defendant No. 1 came in as an assignee of the *ijara*. Under sections 6 and 7, as also section 108, clauses (e) and (j), of the Transfer of Property Act, the lease was transferrable with all the rights appertaining to it. The whole of the *pergunnah* was demised, and for the purpose of improvement. The covenant touched the thing demised, i.e., the land : see note to *Spencer's case* (1), *Austerberry v. Corporation of Oldham* (2), *Nobin Chandra Soot v. Nabab Ali Sarkar* (3), *Hall v. Ewin* (4) and *The New Beerbhoom Coal Company v. Bularam Mahata* (5).

The consideration for the lease being adequate, and a proper rent being stipulated for it, no question of hardship could arise in the case. The contract to give *mourasi* and *mocurrari* lease was not void for being vague and uncertain. The demised land was within the *ijara* land, and Mathewson elected by giving boundaries what land he wanted : *Jenkins v. Green* (6) and *Fry on Specific Performance*, page 147.

The land was not leased out for purposes other than those of the covenant ; besides, it is wholly immaterial. For, if the Deputy Commissioner had granted the lease to Mathewson without any such covenant, under section 17 of the Act, the effect would have been the same. Purposes are within the spirit of the covenant ; and it would not lie in the mouth of the covenantor to say that the covenantee ought to have had got the *mocurrari* before he built the houses, as he allowed the buildings to be raised in his presence.

Sections 3 and 7 of the Act were no bar to the lease in question. The Act refers only to such liability as amounted to and culminated in debts. Besides, the Deputy Commissioner

(1) 1 Sm. L. Cas. 55.

(2) (1885) 29 Ch. D. 784.

(3) (1900) 5 C. W. N. 343.

(4) (1887) 37 Ch. D. 74, 79.

(5) (1880) 1 L. R. 5 Calc. 932.

(6) (1858) 27 Beav. 437.

had a constructive notice of his client's position, and no further notice was necessary : *Daniels v. Davison* (1) and also Dart on Vendors and Purchasers, 7th Edition, page 884.

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[He next dealt with the facts of the case, and submitted that the disputed lands were not excluded from the *ijara*.]

Dr. Rashbehary Ghose (*Babu Digambar Chatterjee*, *Babu Khetter Mohan Sen* and *Babu Mohini Mohan Chatterjee* with him), for the respondent. The suit was not barred by limitation as against defendant No. 2. Section 22 of the Limitation Act (XV of 1877) applies only where the added defendant is a necessary party. It cannot apply to a case where beneficiaries are added after the institution of the suit. Defendant No. 2 comes in for the protection of his own interests. Compare the case of *Suput Singh v. Imrit Tewari* (2). I rely also on the cases of *Guruvayya v. Dattatraya* (3) and *Ravji Appaji v. Mahadev Bapuji* (4). The cases cited by the other side are distinguishable.

Defendants could not claim to retain possession both under a *mocurrari* lease and an implied tenancy from year to year. Receipt of rent by the manager could not create a tenancy from year to year binding upon me. If the lease does not bind me, receipt of rent by the manager is of no effect, and no notice to quit is necessary : *Harendra Narain Singh Chowdhry v. Moran* (5), *Shama Charan Nandi v. Abhiram Goswami* (6), *Sujjad Ahamed Chowdhry v. Ganga Charan Ghose* (7) and *Goomanee Kazee v. Huryhur Mookerjee* (8), and Woodfall on Landlord and Tenant, 17th Edition, page 410.

The Deputy Commissioner had no authority whatever to grant lease, not in ordinary course of management but in pursuance of an agreement entered into by the proprietor. The estate is not vested in the manager. The defendant is not entitled to rely on section 17 of the Act, when the Deputy Commissioner says he did not exercise his powers under the

(1) (1809) 16 Ves. 249, 254.

(2) (1880) I. L. R. 5 Calc. 720.

(3) (1903) I. L. R. 28 Bom. 11, 18.

(4) (1897) I. L. R. 22 Bom. 672.

(5) (1887) I. L. R. 15 Calc. 40.

(6) (1906) I. L. R. 33 Calc. 511.

(7) (1905) 9 C. W. N. 460.

(8) (1863) W. R. Spl. No. 115.

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section. Sections 4, 5, 12, 16 and 22 of the Act will show that the estate remains in the disqualified owner. Only the proprietor has the right to bring a suit for recovery of possession of immovable property : *Jadu Narain Singh v. Gopal Chandra Sen* (1).

Mathewson was not entitled to call for a permanent lease, as the covenant by the Rajah bound only the Rajah, and not his assigns or heirs. Assuming that the covenant was not merely a personal covenant, still the covenant was absolutely bad, as it would violate laws against perpetuities : *Sreemutty Tripoora Soonduree v. Juggur Nath Dutt* (2), *Nobin Chandra Soot v. Nabab Ali Sarkar* (3) and Dart on Vendors and Purchasers, page 257.

The option which was given to Watson & Co. could only be exercised by them and not by their assigns : *Jagadis Chandra Deo Dhabal v. Satrugan Deo Dhabal* (4), *Tolhurst v. Associated Portland Cement Manufacturers* (5). A contract to give a lease is not assignable : Dart on Vendors and Purchasers, page 1068. Here it is not a covenant but a mere option ; it is altogether one-sided. The covenant in the lease is outside the lease, it is not a term of the lease : *Foa on Landlord and Tenant*, page 377. A mere option to get a lease is not property, and is merely personal. Besides, there had been no assignment of the option to the *Limited Company* or to Mathewson, by Messrs. R. Watson & Co.

The lease was not required for any of the purposes mentioned in the covenant, and at any rate the area demised was too large. Having gone on to build without applying to the Rajah for lease, they have abandoned the option : *Lala Beni Ram v. Kundan Lall* (6) and *The New Beerbhoom Coal Company, Ltd. v. Boloram Mahata* (7). The option was not capable of being specifically enforced by reason of hardship, uncertainty and laches : see Fry on Specific Performance, page 188. The right to claim specific performance was barred under sections

(1) Unreported. (Appeal from Order No. 406 of 1895.)

(2) (1875) 24 W. R. 321.

(3) (1900) 5 C. W. N. 343.

(4) (1906) I. L. R. 33 Cal. 1065, 1077.

(5) [1901] 2 K. B. 811.

(6) (1899) L. R. 26 I. A. 58.

(7) (1880) L. R. 7 I. A. 107.

7 and 11 of the Act. The doctrine of constructive notice has no value when the statute says that a notice must be actually served : *Raja Satrugan Deo Dhabal* v. *Raja Jagadish Chandra Deo Dhabal* (1) and *Waghela Rajsan* v. *Sheikhji Masludin* (2).

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The execution of the lease was brought about by fraud and misrepresentation of Mathewson, and the Deputy Commissioner acted under a mistake.

Mr. Hill, in reply.

Cur. adv. vult.

Doss J. The suit out of which this appeal arises was brought by the plaintiff, who is the proprietor of Pergunnah Barabhum in the District of Manbhum to recover khas possession of certain lands after cancellation of a "*maurasi mocrurari* lease (which for brevity's sake shall hereafter be referred to as *mocrurari*)" executed in favour of defendant No. 1 by the manager of the Encumbered Estates Act shortly before the estate was released to the plaintiff. The lease bears date the 26th May 1903, and is for 241 bighas odd of which 222 bighas odd is situated in mouzah Bara Bazar and 19 bighas odd in mouzah Machar and the annual rental for the same is Rs. 100. The circumstances under which this lease was executed are these :—On the 27th February 1883, Raja Brojokishore Singh, the father of the plaintiff, in consideration of a loan of Rs. 60,000 advanced to him by R. Watson & Co., gave them an *ijara* lease for a period of 21 years at an annual rental of Rs. 20,000 commencing from the beginning of the year 1290 Fuslee (which corresponds to the 28th September 1882) and terminating with the end of the year 1310 Fuslee (which corresponds to the 9th September 1903) of a large portion of Pergunnah Barabhum situated on the north of a certain black line delineated in the survey map of Pergunnah, save and except certain parcels specified in the lease. Under that lease the lessor agreed, amongst other things, to grant to the lessees, their heirs, and representatives, during the currency of the lease, a putni lease of a portion of the Pergunnah situated

(1) (1908) 7 C. L. J. 578.

(2) (1887) I. L. R. 11 Bom. 551 ;
L. R. 14 I. A. 89.

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on the south of the black line mentioned above with the exception of certain mouzahs, and the lease also contained the following covenant on the part of the lessor :—" If out of the *ijara* mehal you require any land for the purpose of erecting any indigo factory or silk factory or excavating any *bandh*, or tank, or for construction of any *kutchery* house, I shall grant you a *mourasi mocrurari* pattah for it on proper rent." This covenant forms, as will be seen later, the root of the controversy between the parties. Soon after obtaining this lease, R. Watson & Co. proceeded to construct on that portion of the *ijara* mehal measuring about 200 bighas or thereabouts (which by reason of subsequent occupation by them, has borne the appellation of Shahebdanga), indigo vats, indigo factory building, a *kutch*a bungalow, *amlas'* quarters, servants' quarters, etc., and about the year 1886 erected a *pucca* bungalow. They also planted gardens and cultivated indigo on certain portions of the land. On the 8th March 1885, R. Watson & Co. obtained from the plaintiff's father a putni pattah in respect of the mouzahs of Pergunnah Barabhum situated south of the black line mentioned above in pursuance of the terms of the covenant in that behalf contained in the lease, at an annual rental of Rs. 4,500 and on payment of a bonus of Rs. 30,000. About four years later, *i.e.*, in March 1889, Pergunnah Barabhum was taken over under the Chutia Nagpur Encumbered Estates Act for the purpose of liquidating the debts and liabilities with which that estate had become heavily burdened, and the Deputy Commissioner was appointed as manager under the Act. R. Watson & Co. having on the 25th August 1887 been incorporated as a limited Company under the name and style of R. Watson & Co., Limited, the former assigned all their rights and interests in Pergunnah Barabhum, including their rights under the *ijara* and the putni lease, to the latter Company by an Indenture bearing date, the 26th May 1890, R. Watson & Co., Ltd., again by a similar Indenture, dated 15th April 1896, re-assigned all its rights and interests to defendant No. 1, H. Mathewson. The plaintiff's father died on the 22nd July 1900. As the *ijara* lease was approaching

its termination, H. Mathewson on the 25th June 1901 applied to the Deputy Commissioner, as manager under the Encumbered Estates Act for a *mocurrari* lease of the Shahebdanga lands in pursuance of the covenant in the lease, the terms whereof I have already quoted, and on the 25th May 1903 the Deputy Commissioner with the sanction of the Commissioner of the Chutia Nagpur Division executed in favour of H. Mathewson a *mocurrari* lease in respect of 241 bighas 6 cottas 15 chattaks of land at an annual rental of Rs. 100 after the Board of Revenue had previously, on the 20th April 1903, rejected the petition of the plaintiff objecting to the grant of the *mocurrari* lease. On the 1st October 1905, the estate was released from the operation of the Encumbered Estates Act and was restored to the plaintiff. The present suit was brought on the 24th May 1906 against defendant No. 1 alone, with regard to the 222 bighas out of the lands covered by the *mocurrari* lease and which are situated in mouzah Barra Bazar; the plaintiff in his plaint alleged that they formed part of the lands excepted from the *ijara* lease, that they were used for holding certain religious festivals thereon and that the defendant No. 1 by fraudulently misrepresenting to the Deputy Commissioner that they were included in the *ijara* lease and that under the terms of that lease they were entitled to get a *mocurrari* lease of these lands, had obtained such lease. As regards the remaining 19 bighas of land situated in mouzah Machar, the plaintiff alleged that they were not required for any of the purposes for which the leases under the covenant in the *ijara* lease were entitled to have a *mocurrari* thereof. The defendant No. 1 in his written statement objected that the suit could not be maintained without a previous notice to quit, denied that the lands comprised in the *mocurrari* lease granted to him or any portion thereof, formed part of the lands excepted from the *ijara* lease, and averred that the Deputy Commissioner, the Commissioner of the Chutia Nagpur Division and the Board of Revenue after hearing the objections raised by the plaintiff to the grant of the *mocurrari* lease, and after a full and complete enquiry, and after satisfying themselves that these lands were

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outside the excepted lands, had granted a *mocurrari* lease, and he submitted that under the terms of the covenant in the *ijara* lease the lessees or their representatives were entitled to have a *mocurrari* lease of the lands in suit.

As the defendant No. 1 in his written statement stated that he had sold his rights in the property to the Midnapore Zamindari Company, Limited, the plaintiff applied on the 17th November 1906 for addition of the latter as a defendant. On that date the Court below added the Midnapore Zemindari Company, Limited, as defendant No. 2 in the suit and ordered that summons be issued. The defendant No. 2 entered appearance and filed a petition asking the Court to treat the written statement filed by defendant No. 1 as one filed on its behalf also.

The Court below has held, that it was not necessary for the plaintiff to serve on the defendant any notice to quit, that the lands comprised in the *mocurrari* lease formed part of the lands excepted from the *ijara* lease and that it included lands on which certain religious festivals are held and certain deities are temporarily placed and worshipped, that before granting the *mocurrari*, the Deputy Commissioner made no judicial enquiry as to whether the lands comprised in it had been excluded from the *ijara*, or whether there were, within the area demised, places where certain religious festivals were annually held, nor did he make any enquiry as to whether the purposes for which the *mocurrari* was given were those which were sanctioned by the clauses in the *ijara* lease, that the Deputy Commissioner was precluded from granting a *mocurrari*, as the claim of the defendant No. 1 had not been notified as required by section 7 of the Encumbered Estates Act (VI of 1876); that even if the Deputy Commissioner had authority to grant a *mocurrari* lease in accordance with the terms of the covenant, he could not specifically perform the covenant and execute the *mocurrari* on behalf of the plaintiff without his consent and concurrence and that in doing so, he acted *ultra vires*. The Court below also held that the covenant in pursuance of which the *mocurrari* had been executed was void for want of consideration; that it was vague and uncertain; that if specific

performance thereof had been sought it would have been refused on the ground of laches and hardship; that the defendant No. 1 was not the assignee of the covenantee and, therefore, could not have claimed specific performance; that if a suit for specific performance had been brought, it would have been held barred by limitation; that the annual rental for which the *mocurrari* was granted, was below the prevailing rate and that the defendant No. 1 in obtaining this *mocurrari* had been guilty of fraud and misrepresentation. But as the building had been erected and other improvements had been made during the period of the *ijara* lease (and probably on the faith of the aforesaid clause), the Court below was of opinion that the defendant was entitled to get compensation in respect thereof and it assessed such compensation at the sum of Rs. 5,000. The Court below accordingly set aside the *mocurrari* lease and gave a decree to the plaintiff for possession of the lands in suit subject to payment by him to the defendants of a sum of Rs. 5,000.

From this judgment the defendants Nos. 1 and 2 have appealed. The plaintiff has filed a cross-objection in respect of the sum of Rs. 5,000 and has also claimed therein mesne profits which are approximately laid at Rs. 5,000.

The first contention raised on behalf of the appellant is that as defendant No. 2 was added as a party more than three years after the institution of the suit, as against him it is barred by limitation. In support of this contention reliance has been placed upon two recent Full Bench decisions of this Court, one in the case of *Abdul Rahman v. Amir Ali* (1) and the other in the case of *Ram Kinkar Biswas v. Akhil Chandra Chaudhuri* (2). In the first mentioned case which was a suit by a mortgagee to enforce a mortgage bond, the assignee *pendente lite* of the original plaintiff was after the expiry of the period of limitation substituted for the latter, whose name was thereupon expunged from the record. The Full Bench held that the suit was barred under section 22 of the Limitation Act (XV of 1877), as the assignee had been brought on the

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(1) (1907) I. L. R. 34 Calc. 612.

(2) (1907) I. L. R. 35 Calc. 519.

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record after the period of limitation applicable to the suit had expired. In the second case cited, which too was a suit on a mortgage, the transferee before suit of a portion of the mortgaged property was added as a defendant after the expiry of the period of limitation. The Full Bench held that the suit as against him was barred under section 22 of the Limitation Act. I do not think that the last mentioned case is applicable as the newly added defendant in that case had acquired his right to the mortgaged property prior to the institution of the suit. The same remark applies to the case of *Imam Ali v. Baijnath Ram Sahu* (1) which also was cited on behalf of the appellant. But in my opinion the *ratio decidendi* of the ruling in the first mentioned case governs the present case, though the facts are not precisely similar. Section 22 of the Act in express terms applies equally to the addition or substitution of a defendant after the expiry of the period of limitation. It was pointed out to us by the learned vakil for the respondent that the defendant No. 2 was not a necessary but only a proper party to the suit, and that when he was added as defendant he was added in the same way as beneficiaries are added as parties in suits under section 437, Civil Procedure Code, between a trustee, executor or administrator and a third person, regarding property vested in the former, and that when a person is added merely as a proper party, in the course of the suit, though after the expiry of the period of limitation, section 22 of the Limitation Act ought not to apply. In support of the argument our attention was called to the cases of *Ravji Appaji Kulkarni v. Mahadev Bapuji Kulkarni* (2) and *Guruvayya Gouda v. Dattatraya Anant* (3) decided by the Bombay High Court. In those two cases certain persons were added as co-plaintiffs after the expiry of the period of limitation, the omission of whom from the suit when it was instituted was not a fatal defect in the constitution thereof. It was held that section 22 did not apply to the case. The view taken in these two cases is opposed

(1) (1906) I. L. R. 33 Calc. 613 ;
10 C. W. N. 551.

(2) (1897) I. L. R. 22 Bom. 672.
(3) (1903) I. L. R. 28 Bom. 11.

to the interpretation put on section 22 of the Limitation Act by the decision of the Full Bench in *Abdul Rahman v. Amir Ali* (1) which we are bound to follow. The point, however, has ceased to be of importance owing to a change in the wording of the corresponding section in the new Limitation Act (IX of 1908), by which the anomaly has been removed. But though at the time when the defendant No. 2 was added as a party, the suit as against him was barred, it was conceded in argument that as an assignee *pendente lite*, the defendant No. 2 would be bound by any decree that might be passed in this suit. In the circumstances of the case, I think that the name of defendant No. 2 was unnecessarily joined as a party, and I direct that his name be struck out from the record.

It has next been contended on behalf of the appellants that the suit was not maintainable without a previous notice to quit being served upon defendant No. 1 and that as no such notice has been given, the suit ought to have been dismissed. It was said that even if the *mocurrari* lease might be invalid, yet an independent tenancy from year to year was created between the manager under the Encumbered Estates Act, and defendant No. 1 by the payment and acceptance of rent under the *mocurrari*, and that unless and until such tenancy was determined by a valid notice to quit the suit could not be maintained. In support of this contention reliance was placed upon the opinion of the Law Lords in the case of *The President and Governors of the Magdalen Hospital v. Alfred Knotts* (2). Reference was also made to the case of *Doe on the demise of Rigge v. Bell* (3) and to the notes to that case in 2 Smith's Leading Cases, 10th edition, pages 117 and 118, and further to the cases collected in Tudor's Leading Cases on Real Property, 4th edition, pages 21, 22, in support of the proposition stated in the text that "if a person enters under a lease void for some cause, such as non-compliance with the statute of frauds, although at first he would only be a tenant at will, on

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(1) (1907) I. L. R. 34 Calc. 612.

(2) (1879) L. R. 4 App. Cas. 324.

(3) (1793) 5 T. R. 471 ; 2 R. R. 642.

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payment of rent he may, by presumption or implication of law become a tenant from year to year." The opinion of Lord Selborne in the *President and Governors of Magdalen Hospital v. Knotts* (1) was followed in the case of *Chaitan Singh v. Sadhari Monim* (2) but was dissented from in the case of *Shama Charan Nandi v. Abhiram Goswami* (3) where it was held that possession of the lessee under a void lease is adverse to the lessor from the date of the lease, even though the lessee may have continued to pay the rent reserved. In the case of *Lala Majlis Sahai v. Musst. Narain Bibi* (4) the father of the plaintiff without any authority granted a *mocurrari* lease in favour of defendant No. 1 who thereupon entered into possession. Subsequently the guardian of the plaintiff who had been duly appointed by the Court when the latter was a minor had sued the defendants for arrears of rent and had accepted the sum decreed. This act of this guardian in accepting the rent was held binding upon the plaintiff and was sufficient to create a tenancy from year to year, which could only be determined, by a proper notice to quit. On the other hand, the cases of *Harendra Narain Singh Chowdhry v. T. D. Moran* (5), *Sujjad Ahamed Chowdhury v. Ganga Charan Ghose* (6), *Lala Majlis Sahai v. Musst. Narain Bibi* (4) were relied upon on behalf of the respondent. In first of these cases all that was held was that a lease in perpetuity which is void by reason of its having been granted by a certificated guardian without the sanction of the District Judge as required by section 18 of Act 40 of 1858 could not be held to operate as a lease for a term of years. In the second case, the plaintiff sought to recover possession not on the ground that the defendant was their tenant and that he had incurred forfeiture but on the ground that he was never their tenant and the defendant also said that he was never a tenant of the plaintiffs. Thus it is clear that in that case tenancy was neither alleged nor denied, and the question for determination of a subsisting tenancy by notice

(1) (1897) L. R. 4 App. Cas. 324.

(4) (1902) 7 C. W. N. 90.

(2) (1905) 5 C. L. J. 62.

(5) (1887) I. L. R. 15 Calc. 40.

(3) (1906) I. L. R. 33 Calc. 511.

(6) (1905) 9 C. W. N. 460.

to quit did not arise. As regards the last two cases cited by the respondent it is clear from the facts just stated that they do not touch the present case, nor do I think that the cases cited on behalf of the appellant can be held to govern the present case. The present suit is essentially one to recover possession of certain lands by setting aside a *mocurrari* lease granted by the manager under the Encumbered Estates Act on the ground that it was obtained by the lessee by fraudulent misrepresentation. The *mocurrari* lease is impugned not on the ground that the manager in granting the lease acted *ultra vires* and that it was consequently void but on the ground that it was obtained from the manager by means of fraud. A lease obtained by fraud is only voidable by the lessor and not void *ab initio*. It is valid and binding between the parties until it is avoided. When rent is paid under a void lease which by the very hypothesis creates no legal relation between the parties, the payment of rent is not referable to the lease at all, but is a distinct and independent act which *proprio vigore* establishes a tenancy by legal implication. When, however, rent is paid under a voidable lease, the payment of rent is under the lease and is in satisfaction of the recurrent obligation arising out of the legal relation created by the lease. So long as the legal relation is not dissolved the obligation to pay rent continues. On the other hand, as soon as that relation is determined the obligation to pay rent which is dependent on the continuance of such relation ceases, and the payment of rent made in fulfilment of such obligation must thenceforth necessarily cease to have any legal effect. It follows, therefore, that if the *mocurrari* lease is cancelled, on the ground of fraud the lessee can not resist delivery of possession of the demised land to the lessor on the ground that, despite the cancellation and delivery up of the lease, there is yet a subsisting tenancy outstanding which entitles him to retain possession of land until such tenancy is determined by proper notice to quit. I think, therefore, that this contention of the appellant must fail.

It was also contended by the learned counsel for the appellant that under section 17 of the Chutia Nagpur

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Encumbered Estates Act as amended by Act V of 1884, the manager had absolute power to grant a lease in perpetuity in consideration of a fine or even without any fine. On the other hand, it was pointed out to us by the respondent that the power of alienation by way of mortgage, or by sale, conferred on the manager by section 18 of the Act, is qualified by the condition that he has this power only in case money is required for the settlement of the debts and liabilities of the proprietor.

It was urged that if the manager's power is subject to this qualification in the case of a mortgage or a sale, it ought, *a fortiori*, to be subject to a similar qualification in the case of a demise in perpetuity, with or without fine, of all or any part of the property under his management and that the very purpose and the object of the Act which is to discharge the debts and liabilities of the proprietor and to set him up in an unembarrassed state, clearly indicates that the power of the manager should be circumscribed within the limits defined by such purpose.

Our attention was also drawn to the fact that under section 17 of the Act, the power of the manager is subject to the rules framed, under section 19 of that Act, and one of these rules, namely, Rule No. 3, provides that an encumbered estate should be administered in accordance with the general rules for Wards' estates as far as practicable. The provisions of section 18 of the Court of Wards Act (IX of 1879) which empower the Court of Wards to grant leases, or mortgage or sell any property under its charge and "do all such other acts as it may judge to be most for the benefit of the property and advantage of the ward," were also referred to.

I think the contention of the respondent is sound as being in consonance with the declared policy and object of the Act. Though section 17 of the Act is apparently wide in its terms and though it probably confers on the manager a somewhat large measure of discretion for the management of the estate, I do not think it enables him to do any act which is demonstrably injurious to the interests of the estate. In *Muhammad*

Mumtaz Ali Khan v. Fairhat Ali Khan (1) their Lordships of the Privy Council observed "that the Court of Wards has of course all the ordinary powers of a guardian over a ward's property, supplemented by certain additional powers given by statute," and they held that the words "and to do all such other acts as it may judge to be most for the benefit of the property and the advantage of the disqualified proprietors" in section 172 of the Oudh Land Revenue Act, 1876, did not confer upon the Court of Wards the power of making assignments in perpetuity of certain villages out of the Ward's estate in lieu of maintenance payable out of the estate to certain persons, inasmuch as such assignments amounted to a voluntary alienation in perpetuity of the Ward's estate. The execution of this lease in perpetuity without a bonus, and that not for the purposes of reclamation of any waste land or other purposes of a similar kind cannot be justified as an act done in the course of prudent management of the estate. The validity of this *mocurrari* as an act within the ambit of the power of the manager must, therefore, rest upon the covenant in the *ijara* lease and that covenant alone. Consequently, if the *mocurrari* lease embraced any one or more of the excepted parcels, it would, in my opinion, be beyond his competence and indeed Mr. Clark, the Deputy Commissioner, in his evidence, admits that he would not have granted the *mocurrari* if he had known that H. Mathewson was not entitled to have it under the terms of the *ijara*.

* * * * *

The whole of the disputed land with the exception of the portion on the south being thus found to be outside the reserved parcels, the next question is whether the Deputy Commissioner as manager under the Encumbered Estates Act, had power, with the sanction of the Commissioner, to grant the *mocurrari* lease in question.

It was argued on behalf of the respondent that the manager had no such power : *first*, because the right of the lessee under the covenant to call upon the lessor to execute a *mocurrari*

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lease was barred under section 7, Chutia Nagpur Encumbered Estates Act (VI of 1876), notice of the claim under such covenant not having been given to the manager in the manner and within the time prescribed by the Act.

Secondly, because the manager was not competent to execute a *mocurrari* lease without the consent of the proprietor, that is, the plaintiff.

Thirdly, because if a suit for specific performance of the covenant had been brought by the defendant No. 1 against the manager, it would have been dismissed for the following reasons, namely, (a) that the covenant infringes the rule against perpetuities, (b) that the *mocurrari* lease was not required for any of the purposes specified in the covenant, (c) that the defendant No. 1 was not entitled to the benefit of this covenant, (d) that the defendant No. 1 was guilty of *laches* in enforcing the covenant and (e) that specific enforcement of the covenant would inflict hardship on plaintiff.

Fourthly, because the area leased out by the *mocurrari* was outside the *ijara* mahal and fell within the excepted parcels.

With regard to the *first* ground, namely, that the claim was barred under section 7 of Act VI of 1876, it was contended that the right of the lessee to enforce the covenant in question created a corresponding liability on the part of the lessor to perform that covenant, that such liability is a liability in the sense in which that term is used in that section and as it had not been duly notified to the manager within the time and in the manner prescribed by the Act, it had become barred. In support of this contention, reliance was placed on the case of *Jagadis Chandra Deo Dhabal v. Satrugan Deo Dhabal* (1) in which it was held that a covenant by a proprietor to execute a putni lease was a liability within the meaning of that word in section 7.

Assuming that the covenant in this case imported on the part of the proprietor a liability within the meaning of that term in section 7 of the Act, but guarding myself from being understood to assent to this view, I am of opinion that notice

of the claim was unnecessary in the present case, because the manager, when he assumed management of the estate which was at the time under *ijara*, must be deemed to have had under the law constructive notice of the lessee's right to claim under the covenant in the *ijara* lease the *mocurrari* lease of any land within the leasehold for certain purposes. In *Barnhart v. Greenshields* (1), their Lordships of the Privy Council thus observed :—" With respect to the effect of possession merely, we take the law to be, that if there be a tenant in possession of land, a purchaser is bound by all the equities which the tenant could enforce against the vendor, and that the equity of the tenant extends not only to interests connected with his tenancy, as in *Taylor v. Stibbert* (2) but also to interests under collateral agreements as in *Daniels v. Davison* (3), *Allen v. Anthony* (4), the principle being the same in both classes of cases, namely, that possession is notice that he has some interest in the land, and that a purchaser having notice of that fact, is bound, according to the ordinary rule, either to enquire what that interest is, or to give effect to it, whatever it may be."

Then again assuming that notice of the claim ought to have been given, I think that as the proprietor appealed to the Commissioner against the order of the Deputy Commissioner, in which he held that the *mocurrari* ought to be granted, and that as the Commissioner upheld the order of the Deputy Commissioner, such order is, under section 10 of the Act, final, and the matter cannot be re-opened by a suit. Furthermore, the fifth paragraph of section 12 of the Act as amended by Act V of 1884 which, *inter alia*, enacts that the debts and liabilities barred by section 7 shall, on restoration of the estate to the proprietor, be revived, necessarily implies that the debt or liability which is barred under section 7 is not extinguished, but that so long as the estate continues under the operation of the Act, the remedy only is barred, the right subsisting. In my opinion, it does not follow from section 7, that if the

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(1) (1853) 9 Moo. P. C. 18.

(3) (1809) 16 Ves. 249.

(2) (1794) 2 Ves. Jun. 437.

(4) (1816) 1 Meriv. 282.

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manager without any notice, as required by section 7, satisfied a debt or liability, the proprietor could, after the restoration of the estate to him, bring a suit to recover back the money so paid, or annul any deed executed by the manager in fulfilment of that liability and do so merely on the ground of absence of notice. This contention must, therefore, fail.

As regards the second ground, namely, that the manager could not grant a lease without the consent of the proprietor, I think it is equally unsustainable. Under section 18, para. 3 of Act VI of 1876 (before it was amended by section 8 (a) of Act V of 1884), the power of the manager to sell any portion of the property was expressly made subject to the qualification, that he could do so, only "with the previous consent of the holder of the property and of the person (being of full age), who would be his heir if he died intestate," whereas under section 17 of the same Act (before it was amended by section 7 of Act V of 1884), the power of the manager to demise any part of the property for a period not exceeding twenty years was not subject to any such qualification at all. It is clear, therefore, that under Act VI of 1876, the manager had the power to demise any part of the property for a period, not exceeding twenty years without the consent of the proprietor.

The Amending Act V of 1884 has removed the restriction on the power of the manager to sell, and has at the same time, empowered him to demise in perpetuity so that the manager is now entitled to sell or demise in perpetuity without the consent of the proprietor.

The learned vakil for the respondent referred us to an unreported judgment in the case of *Jadru Narain Singh v. Gopal Chunder Sen, Tekait Todal Narain Singh v. Jadub Chunder* (1), which laid down that it is the proprietor and not the manager under the Encumbered Estates Act, who has the right to bring a suit to recover possession of immoveable property.

It is not clear from the judgment what the nature of the suit in that case was, but assuming that it was a suit for

(1) (1896) Unreported; (Appeal from order, No. 406 of 1895.)

possession of immoveable property, it does not follow from this decision that a lease granted by a manager is not valid, unless the proprietor joins in the lease or gives his consent to the granting of the lease. The language of the section appears to me to be too clear and explicit to be overridden by an inference drawn from the right of the proprietor to bring suits in certain cases while the estate is subject to the operation of the Act.

It is further insisted that inasmuch as all that is vested in the manager under section 2 of the Act is the "management of the immoveable property," the ownership still continues in the proprietor and that unless the proprietor concurs in the lease by the manager, it is not binding upon the former.

This argument assumes that during the period the estate is under the operation of the Act, the proprietor possesses the power of concurring in the lease. Clause 3 (a) of section 3 of the Act which deprives the proprietor of his power to mortgage, charge, lease, or alienate his immoveable property or part thereof, clearly negatives the existence of any such power. It follows, therefore, that a lease in perpetuity granted by the manager which is otherwise valid is not the less binding on the proprietor because he was no party to it, or that it was granted without his consent.

With regard to the first branch of the third ground, namely, that if a suit for specific performance of the covenant had been brought by the defendant No. 1 as against the manager, it would have been dismissed on the ground that it infringes the rule against perpetuity, it is necessary to observe at the outset, and this was also admitted on behalf of the respondent, that the rule applies only to future interests in land, which may by any possibility be capable of vesting, beyond the legal limit of perpetuity. The passage in the *ijara* lease in which the covenant is embodied, together with the preceding sentence runs thus:—"After the expiration of the *ijara*, you shall have no right whatsoever to the *ijara* mehal. If out of the *ijara* mehal you should require any land for the purpose of erecting any indigo factory, &c., I shall grant you a *maurasi*

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mocurrari pattah for it on proper rent." I think that the intention of the parties to be gathered chiefly from this context, as also from other parts of the *ijara* lease was that the lessor would grant a *maurasi mocurrari* lease in case the lessee during the term of the lease required any land out of the *ijara* mehal. To my mind, the clause contains a restriction not only as to the area out of which the *mocurrari* was to be granted, if required, but also a restriction as to *time*.

Reliance was placed on the presence of the words "If you, within the term of the *ijara*, wish to take a *putni* settlement of the *mouzahs*, &c.," in the lessor's covenant to grant a *putni* settlement, and in the absence of similar words in the clause for granting a *mocurrari*, as raising the inference that the lessor intended to confer on the lessee the right to call for a *mocurrari* at any future time, however remote.

It does not seem to me reasonable to suppose that after the term of the *ijara* had expired and after "all rights whatsoever" of R. Watson & Co. to the *ijara* mehal had ceased, and their connection therewith had terminated, it was intended by the lessor that R. Watson & Co. who were foreigners should have the right at any future time, however remote, to call upon him or his heirs and representatives to execute a *mocurrari* lease. If the operation of the covenant is confined to the term of the *ijara* lease, as in my opinion it ought to be, it is conceded that it does not contravene the rule against perpetuities. In this view of the matter it becomes unnecessary to discuss the cases which have been cited in support of the contention.

As regards the second branch of the third ground, namely, that the *mocurrari* lease was not required for any of the purposes specified in the covenant, it was urged that the indigo factory and the cutchery house had been built and *amlas'* quarters had been erected so far back as the year 1887, and that although the indigo business had been carried on since 1883-84, it had admittedly been stopped in 1895, that the industry was dead and gone and there was no prospect of its revival, that R. Watson & Co. never started any silk factory at all, and that

consequently when the defendant No. 1 applied to the manager for a *mocurrari* lease, he did not, and could not have asked for the lease for any of the purposes specified in the covenant.

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I do not think it can be positively affirmed that there is no possible chance of the indigo business being revived in this locality. But, apart from that fact, there can be little doubt that R. Watson & Co., when they constructed these buildings and made all these improvements, must have done so on the faith of this covenant in the *ijara* lease and in the firm and sure belief that they could obtain the *mocurrari* at any time during the currency of the *ijara*. If, before the construction of the indigo factory and the cutchery house and other buildings, R. Watson & Co. had called upon the plaintiff's father to execute a *mocurrari* lease, then, unless the covenant was invalid on other grounds, it would have been impossible for the plaintiff's father to resist the demand. Strictly speaking, no doubt the *mocurrari* was not required for any of the purposes specified in the covenant, in the sense that such purposes were to be carried out after its execution, but in reality, it was required to secure a legal foundation for, and to give validity to, the possession of the land already taken. The laying out of considerable sums of money by the lessees in the erection of permanent structures on the land for those very purposes that are mentioned in the covenant and hence referrible to the covenant and to the covenant alone, and all this done undoubtedly to the knowledge of the lessor who resided close by, must be regarded as part performance, and, indeed, a substantial part performance of the covenant for a perpetual lease, such as would entitle the covenantee to claim specific performance of the covenant on the ground that it would be inequitable and fraudulent for the covenantor to refuse to perform the covenant: *Farrall v. Davenport* (1), *Howard v. Patent Ivory Manufacturing Co.* (2); see also section 22, clause

(1) (1861) 3 Giff. 363 ;
 8 Jur. N. S. 1043.

(2) (1888) 38 Ch. D. 156.

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III of the Specific Relief Act. I, therefore, think that a suit for specific performance could not have been resisted on this ground.

The case of *The New Beerbhoom Coal Company, Ltd. v. Boloram Mahata* (1) was relied upon by the respondent as showing that when the lessor covenants to grant additional lands to the lessee, if he requires them for a certain defined purpose, the lessee or his assignee cannot demand specific performance of such covenant, if he requires the land for some other purpose. In that case the purpose for which the lessor agreed to grant a lease of additional lands was the carrying on of the colliery business, whereas the purpose for which lease of the additional land was required was the selling of it to another at a profit. This was held to fall outside the purpose specified in the covenant, and hence specific performance was refused. This case clearly does not touch the present case in which the lease is not required for a different purpose, but one in which the purpose has been already executed in anticipation of the lease.

As regards the third branch of the third ground, namely, that specific performance would have been refused on the ground that the defendant No. 1 was not entitled to the benefit of this covenant, it was argued that the covenant in question was merely personal, and not one running with the land, and secondly, if it was personal, that there are no express terms in the *ijara* lease which would make the covenant binding as between the assignees of the original parties, nor are there words in either of the Indentures of assignment, capable of passing the benefit of the covenant to either R. Watson & Co., Limited, or to defendant No. 1.

This contention, it was conceded in argument, is inconsistent with the contention that the covenant infringes the rule against perpetuities. A covenant is not obnoxious to this rule unless it creates an interest in land. A mere personal covenant is not open to objection on the ground of remoteness

(1) (1880) L. R. 7 I. A. 107.

or as tending to create a perpetuity : see *Walsh v. Secretary of State for India* (1), *Witham v. Vane* decided by the House of Lords and reported as an appendix to Challis's Law of Real Property. The two contentions were, however, afterwards put forward alternately.

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In support of the contention that the covenant did not run with the land, the case of *Woodall v. Clifton* (2) was strongly relied upon. In that case, a lease of land for 99 years granted in 1867 contained a proviso that in case the lessee, his heirs, or assigns, should at any time during the term be desirous of purchasing the fee simple of the land at a certain rate per acre, the lessor, his heirs, or assigns, on receipt of the purchase money would execute a conveyance of the land in favour of the lessee, his heirs and assigns. The assignee of the lease brought an action against the assigns of the lessor to compel a conveyance of the land, and the question raised was whether the burden of the proviso or covenant ran with the reversion and was binding upon the assigns of the lessor under the statute of 32 Henry VIII, C. 34. The Court of Appeal held that the proviso or covenant did not fall within the statute, so as to make the burden of the covenant run with the reversion, and that consequently the action could not be maintained against the assigns. This case, supposing its authority were binding on us, which, however, it is not, is not decisive of the question before us.

The question we are concerned with here is not whether the burden of the covenant runs with the reversion, but whether the benefit of the covenant runs with the land, or in other words, the question here relates not to the liability to fulfil the covenant, but the right to exact fulfilment thereof. With this latter question the statute of Henry VIII does not profess to deal.

It is worthy of note that the Courts in America have held that a covenant in a lease giving the lessee option to purchase is a covenant running with the land, and passes to the assignee of the lease, and is specifically enforceable by him : *Kerr v.*

(1) (1863) 10 H. L. C. 367.

(2) [1905] 2 Ch. 257.

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Day (1), *Laffan v. Naglee* (2), *Blakeman v. Miller* (3), *House v. Jackson* (4). Upon this point there is a consensus of judicial opinion in that country.

Returning to the case of *Woodall v. Clifton* (5) Romer L. J. in delivering the judgment of the Court of Appeal took care to distinguish the covenant then before the Court from a covenant for the continuance of a term. He observed :—

“ It (*i.e.*, the covenant) is not a provision for the continuance of the term, like a covenant to renew, which has been held to run with the reversion, though the fact that a covenant to renew should be held to run with the land has by many been considered as an anomaly, which it is too late now to question, though it is difficult to justify.” Later he continues—“ It is, to our minds, concerned with something wholly outside the relation of landlord and tenant with which the statute of Henry VIII was dealing.”

It is clear that the performance of the covenant with which we are dealing, has not the effect of putting an end to the relation of landlord and tenant in regard to that portion of the *ijara mehal* for which the *mocurrari* might be granted. It is in essence a covenant for an extension or continuance of that relation in perpetuity at a fixed rent concerning a portion of the land demised. It cannot be predicated of this covenant that it is one concerned with something wholly outside the relation of landlord and tenant.”

One very important test whether the benefit or burden of a covenant or contract in any particular case runs with the land or not is whether such covenant or contract in its inception binds the land. If it does, it is then capable of passing with the land to subsequent assignees ; if it does not, it is incapable of passing by mere assignment of the land. There can hardly be much doubt that the covenant in question is one which in its inception binds the land. In the case of

(1) (1850) 14 Pa. St. 112 ;
 53 Am. Dec. 526.

(2) (1858) 9 Calif. 662 ;
 70 Am. Dec. 678.

(3) (1902) 136 Calif. 138 ;
 89 Am. St. Rep. 120.

(4) (1893) 24 Oreg. 89 ; 32 Pac. 1027.

(5) [1905] 2 Ch. 257, 278.

Rogers v. Hosegood (1), Collins L. J. (now Lord Collins) in delivering the judgment of the Court of Appeal after discussing several authorities observed as follows :—"These authorities establish the proposition that, when the benefit has been once clearly annexed to one piece of land, it passes by assignment of that land, and may be said to run with it, in contemplation as well of equity as of law, without proof of special bargain or representation on the assignment. In such a case it runs, not because the conscience of either party is affected, but because the purchaser has bought something which inhered in, or was annexed to, the land brought." This observation was no doubt made with reference to the case of vendor and purchaser, but I apprehend it is equally applicable to the case of lessor and lessee. Another test laid down by the House of Lords in the recent case of *Dyson v. Forster* (2) is whether the covenant affects the nature, quality or value of the land. The *ijara* lease, with a covenant for a *mocurrari* is undoubtedly more valuable than it would be without such covenant.

I, therefore, think that this contention equally fails. In this view it is perhaps needless to notice the argument of the respondent, namely, that there are no express words in the *ijara* lease which would make the covenant binding as between the assignees of the parties, or in either of the two Indentures which are capable of passing the benefit of the covenant to the assignee. But as this point has been argued at some length, I desire to state my views in regard to it. The *ijara* lease expressly provides that "all the terms of this pattah shall be fully binding upon me and my heirs and representatives and upon you and your heirs and representatives." It was said that the words "terms of this pattah" referred to the usual covenants between a lessor and a lessee and did not include any unusual or collateral covenant like the one in question. I am unable to assent to this argument. Taken along with the rest of the document the words are too clear to admit of any such interpretation. If this argument were

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(1) [1900] 2 Ch. 388.

(2) [1909] A. C. 98.

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sound, it would lead to this result that if the lessor died the day after the execution of the *ijara* lease, the covenants for the putni lease and the *mocurrari* lease respectively would cease to be operative. This indeed is clearly opposed to the manifest intention of the parties.

By the Indenture, dated the 26th May 1890, "all rights whatsoever and interests in, or over the land 'and' all claims and demands whatsoever of the said vendors in and to the property" are assigned by R. Watson & Co. to R. Watson & Co., Limited, and by the Indenture, dated the 15th April 1906, "all manners of rights" are assigned by R. Watson & Co., Limited, in favour of the defendant No. 1. It follows, therefore, that the defendant No. 1 was entitled to the benefit of this covenant and to enforce specific performance of it, if not debarred from doing so, on any other grounds.

The fourth branch of the third ground is that specific performance would have been refused on the ground of laches. As regards this, the Court below has held that as the buildings on the land had been completed before 1887, if R. Watson & Co. or their assigns were entitled to have a *mocurrari* of those lands under the covenant, time began to run against them for that year and consequently Mathewson's application to the manager for the *mocurrari* which was made in June 1901 was hopelessly barred. I do not think that this is a correct view of the law. Time could not run against the covenantees or their assigns unless there was demand on their part and refusal on the part of the covenantor or his assigns. There is no suggestion, far less any evidence, that any demand for the *mocurrari* had been made previous to June 1901.

The fifth branch of the third ground is that specific performance would have been refused on the ground of hardship. The Court below has held that specific performance would have been refused, because, on the land for which *mocurrari* has been given, certain religious festivals are annually celebrated by the Rajah of Beerbhoom and his people.

It seems to me that this hardship is more apparent than real, because notwithstanding the occupation of this area by

R. Watson & Co. ever since 1883, religious festivals have continued to be held there annually without any difficulty.

I shall briefly notice a point mentioned in the judgment of the Court below but not relied upon by the respondents in the argument before us that the covenant is void for want of consideration, and specific performance would have been refused on that ground too.

It is enough to say that R. Watson & Co. advanced to the plaintiff's father a loan of rupees sixty thousand for the purpose of liquidating his debts and it was in consideration of this advance, that the plaintiff's father executed in their favour the *ijara* lease containing among others, the covenant in question. This loan is a sufficient consideration for each and every one of the covenants on the part of the lessor.

The fourth ground is that the manager had no power to execute a *mocurrari* lease of any land falling within one or more of the excepted parcels. This point I need not discuss as I have already held that with the exception of the portion on the south, the *mocurrari* does not embrace any land forming part of the excepted parcels. The lower Court has held that the Deputy Commissioner held no judicial enquiry, in the sense that he did not examine witnesses on oath in order to determine whether the *mocurrari* included any of the excepted parcels. I do not think it was necessary for the Deputy Commissioner in conducting his enquiry before granting the *mocurrari* to examine witnesses on oath or record their depositions. It would be enough, in the circumstances of this case, if he made a full and complete investigation in the matter and this, in my opinion, he did. He gave the proprietor every opportunity of representing his views on the matter; he took the opinion of the Government Pleader and he personally inspected the spot and examined, though not on oath, several persons in the locality for the purpose of verifying the correctness of the statements of the parties. This is shown by the orders recorded in the continuous order-sheet, and by Mr. Clarke's evidence.

I think, however, that through mistake on the part of H. Mathewson and the Deputy Commissioner the land which I

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have held to form part of Indkuri Bazar was included in the *mocurrari*, which should therefore be rectified by excluding that area from it.

Besides in the *mocurrari* lease the right of the zemindar of Barabhum and of his people to hold once every year the usual *Ind* festival only on the site called *Indtar* has been reserved. The right to hold the other religious festivals has not been reserved. I think that in addition to the *Ind* festival, the right of the zemindar of Barabhum and of his people to hold the annual *Banabhojan* and *Bhejabenda* festivals as heretofore, should also be reserved in the lease in express terms. It is clear from the evidence adduced on both sides, that these festivals are old religious institutions in which the Raja and all the people of Pergunnah Barabhum take part. They were in vogue when the *ijara* lease was granted and have been celebrated annually at fixed periods since that time. The plaintiff's father, if the *mocurrari* had been executed by him during his lifetime, could not have deprived the people of Barabhum of these rights, which are in the nature of customary rights. Moreover, when R. Watson & Co. selected this particular site for occupation in anticipation of the *mocurrari* lease, they were fully cognizant of the nature of the locality, and of the burdens to which it was subject. They and their successive assignees have ever so long submitted to these burdens without any demur. Presumably, therefore, this inconvenience is not so substantial in degree as to interfere with the free and comfortable enjoyment of the land.

The result, therefore, is that the appeal is partially decreed, the judgment and the decree of the Court below are set aside, and it is ordered that in lieu thereof a decree be made rectifying the *mocurrari* lease, dated the 25th May 1903, by excluding from it the land inclosed within the thick black line drawn by us and marked on the Commissioner's map with the letters P. Q. R. S. T. U. V. W. and X. (which map with the lines so drawn shall form part of this decree) and by declaring its subject not only to the right to hold the *Ind* festival, but also to the right of the zemindar of Barabhum and of his people to

hold once annually at fixed periods and in the same manner as heretofore the *Bhejabenda* or otherwise called *Lakhya bendya* and the *Banabhojan* festivals, and declaring that subject to this rectification, the *mocurrari* lease stands good and is binding and operative upon the plaintiff.

As the appellant No. 1 has only partially succeeded, he is entitled to three-fourths of the costs.

As the defendant appellant No. 2 was made a party upon the objection of defendant No. 1 he is not entitled to any costs either in this Court or in the Court below.

Against the decree of the Court below directing that the plaintiff do get possession of the *mocurrari* lands in payment of Rs. 5,000, as compensation, the respondent has preferred a cross-appeal, and it has been contended on his behalf that as the *ijara* lease was for a limited period, the lessces or their assignees are not entitled to any compensation for the structures built by them on the land. As the appeal is decreed this cross-appeal necessarily fails. We make no order as to costs in the cross-appeal.

RICHARDSON J. I agree generally in the conclusions arrived at by my learned brother but with great deference I am not prepared to commit myself to all the reasoning on which he has founded himself. It is perhaps right, therefore, that I should as briefly as possible state my opinion in my own way.

In regard to the preliminary plea of limitation which is raised on behalf of defendant No. 2, I agree that in this Court we are bound by authority to accept this plea: *Abdul Rahman v. Amir Ali* (1). The law has now been altered and the matter possesses no interest for the future. I am doubtful, however, whether it can be said that the defendant No. 2 was improperly joined as a party to the suit under section 32 of the old Civil Procedure Code or Rule 10 of Order I of the New Code. In the circumstances, however, having regard especially to the late

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(1) (1907) I. L. R. 34 Calc. 612.

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stage at which the plea was raised, I assent with some doubt to the order which my learned brother proposes to make.

As to the omission to serve a notice to quit, on defendant No. 1, we are dealing here with a claim to hold land under a permanent lease (*mocurrari maurasi*), and it appears to me that the current of authority in this country is decidedly in favour of the view that when such a lease is attacked on the ground that it is void or voidable the case which it is sought to establish is that the person who has been purporting to hold as tenant under the lease, was never a tenant in fact, but a trespasser *ab initio*. It would seem to follow that while on the one hand he is at liberty to rely on adverse possession for the statutory period as a defence, though of course he cannot obtain a larger interest than he affects to have exercised, on the other hand he is not entitled to a notice to quit. Money paid as for rent under an invalid lease may perhaps be regarded as money paid on account of mesne profits. The question has often been discussed and I need not do more than mention some reported cases. The cases of *Ram Kanai Ghosh v. Raja Sri Sri Hari Narayan Singh Deo Bahadur* (1) and *Shama Charan Nandi v. Abhiram Goswami* (2), decided in this High Court, may be cited, and reference may also be made to the judgment of Batty J. in *Thakore Fatesingji Dipsangji v. Bamanji Ardeshir Dalal* (3) and to the cases of *Seshamma Shettati v. Chickaya Hegave* (4) and *Parameswaram Mumbannoo v. Krishnan Tengal* (5).

These preliminary pleas being disposed of, I agree that the plaintiff's case was based in the plaint entirely on fraud and misrepresentation. The statement in para. 10 of the plaint that the Deputy Commissioner as manager of the Estate had exceeded his powers and jurisdiction, appears to mean this that he had exceeded his powers in giving a lease of lands to which the covenant in the *ijara* pattah did not apply, and is merely a corollary to the charge of fraud. I agree also that there is no evidence to support the charge of fraud and no reason to

(1) (1905) 2 C. L. J. 546.

(3) (1903) I. L. R. 27 Bom. 517.

(2) (1906) I. L. R. 33 Calc. 511.

(4) (1902) I. L. R. 25 Mad. 507.

(5) (1902) I. L. R. 26 Mad. 535.

suppose that the Deputy Commissioner suffered himself to be misled by anything which was said by the defendant No. 1. On the contrary, the defendant No. 1 was held at arms length throughout the negotiations. It is stated in the plaint that the application for a lease was made in October 1901. As a matter of fact the correspondence began some months earlier in June. The lease was not executed till the 25th May 1903. In the meantime, the Deputy Commissioner had heard all that the plaintiff had to say, had consulted the Government pleader of the District and besides directing enquiries through his officers had himself made a local investigation as to, and formed an independent opinion upon, the question whether the lands of which a lease was claimed, were in whole or part lands excluded from the operation of the *ijara* pattah. The plaintiff No. 1 is ready enough to attribute mistake to the Deputy Commissioner but his animus against the defendant No. 1 is such that he will not admit the possibility of any honest mistake on the part of the latter. In regard to the opinion of the Subordinate Judge on this part of the case his mind seems to have been coloured by the importance which he attached to the assertion that the lease interfered with the conduct of certain religious festivals, and he appears therefore to have been unable to give a dry and dispassionate consideration to the evidence.

By way of further comment on the allegations of fraud, the remark may be made that while the fraud attributed by the plaintiff to the defendant No. 1 consisted in fraudulent mis-statements as to the lands included in the *ijara* pattah, his own statements as to the lands excluded from the pattah are now found to be, to say the least, much exaggerated.

As the charge of fraud cannot be supported, it might have been thought that the case would end here. But a number of other issues were raised in the lower Court apparently without objection by the defendants, and consequently a number of other questions have been discussed by the Subordinate Judge, in a confused and somewhat unintelligible judgment. It was no doubt natural that when the case came into Court

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and its legal bearings came to be better understood by the plaintiff's advisers, an attempt should be made to set aside the lease not only on the ground of fraud but on any other ground which ingenuity might suggest. It is these subsidiary contentions which give rise to the greatest difficulty.

The most plausible of these contentions is this that, fraud or no fraud, the lease was beyond the powers of the Deputy Commissioner under the Chutia Nagpur Encumbered Estates Act. I agree that the wide powers conferred by section 17 of the Act must be limited on general principles in the way suggested. I agree further that in spite of this limitation, the existence in the present case of the covenant in the *ijara* pattah must be taken into account, and I think that unless there are any other provisions of the Act which stand in the way, the Deputy Commissioner had jurisdiction under section 17 in the ordinary course of management to grant, with the sanction of the Commissioner, a reasonable lease in pursuance of the covenant. But then it is urged that the covenant was a liability to which the holder of the estate or the estate itself was subject, and that the Deputy Commissioner was barred by section 7 from admitting the claim because no notice of it had been given. Moreover, the defendant No. 1 was barred from instituting a suit to enforce the covenant both under section 7 and under section 3, the latter section having been held to apply not only to proceedings pending at the date of an order under section 2 but also to proceedings thereafter taken: *Kameshar Prasad v. Bhikhan Narain Singh* (1). As to these contentions while I think that the Act requires express notice of "debts" and "liabilities" and that constructive notice is not sufficient, I agree that having regard to the scheme of the Act, the mere absence of notice of the claim is not a valid ground for setting aside the lease. The Act is not scientifically drawn but is a rough and ready measure applicable to a backward part of the country. I think that it may, in the respect referred to, be reasonably interpreted in the manner indicated by my learned brother. It may be mentioned in passing that the scheme of

this Act differs from that of the Act which the Privy Council had to consider in *Waghela Ragsanji v. Shekh Mastudin* (1).

I do not think that it is necessary to consider in detail the various arguments employed at the bar to support the proposition that the covenant is not one of which specific performance could have been enforced. This contention was urged for the purpose of showing that the lease is not one which the Deputy Commissioner should have granted, but as Mr. Hill observed there is a considerable difference between a suit for specific performance and a suit to set aside a completed conveyance. By way of illustration I may refer to *Wilde v. Gibson* (2). There was no such vice in the covenant as would render it void and ineffectual for all purposes, so that there would be no consideration at all for its performance. The covenant was capable of being interpreted and acted upon as between lessor and lessee. The estate being under the management of the Deputy Commissioner, he took legal advice and executed a lease which he considered to be a fair lease in the circumstances. His *bonâ fides* has never been disputed and it has now been found that there is no ground for impugning the *bonâ fides* of the defendant No. 1. No doubt the Deputy Commissioner says that he would not have executed the lease if he had not thought that the estate was bound by it. But an arrangement was concluded and the covenant was resolved into the executed lease. So far as the covenant was vague and uncertain, its meaning has now been fixed. If it did not run with the land—I think the contrary is the case, but if that be assumed for the purposes of argument—it has now been made fast to the land. And so on as to the other contentions. No doubt, again there is a permanent alienation of the land but it is not a voluntary alienation because a rent is reserved and it has not been shown that the rent is inadequate. The Deputy Commissioner and the defendant No. 1 appear to have been mistaken in regard to a portion of the land demised and that mistake is being dealt with. For the rest, if the Deputy

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(1) (1887) L. L. R. 11 Bom. 551 ;
L. R. 14 I. A. 89.

(2) (1848) 1 H. L. C. 605.

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Commissioner was mistaken at all, his mistakes were mistakes of law, and I can find no common mistake of fact and no common mistake of law of the kind equivalent to a mistake of fact, which goes to the root of the executed contract and would justify us in saying that it is inequitable that the defendants should not be allowed to retain the benefit of this lease. For illustration, see *Bingham v. Bingham* (1), *Soper v. Arnold* (2) and *Watson & Co. v. Sham Lal Mitter* (3). It appears to me in the circumstances that in reference to this aspect of the case as in reference to the charge of fraud, the plaintiff cannot take higher ground than the Deputy Commissioner might have taken if he had been the plaintiff. I hold, therefore, that the lease cannot be set aside for any of the reasons given to show that the covenant was not specifically enforceable.

It may be mentioned that the defendants are putnidars of a considerable portion of the zemindari and they require the cutchery on the land for the purpose of transacting their zemindari business. The covenant in the *ijara* no doubt contemplated the building of a cutchery for this purpose.

It has been already indicated that the powers conferred by section 17 are not absolute and unlimited, and the substantial question which arises is whether in view of the facts and history of the case and the course of the dealings in regard to the land in dispute, the lease granted is a fair and reasonable lease in the circumstances. Subject to certain reservations the question may be answered in the affirmative. The Deputy Commissioner was acting in a fiduciary capacity and the defendant No. 1 knew this. But I can find nothing which amounts to a breach of trust on the part of the Deputy Commissioner, and it is only by establishing a clear breach of trust or confidence that the plaintiff can succeed. The reservations relate to part of the land which has been included in the lease and to the omission of any provision in the lease in respect of two of the three religious festivals which according to the evidence are celebrated on or in the neighbourhood of the land demised. It

(1) (1748) 1 Ves. Sen. 126.

(2) (1889) 14 A. C. 429.

(3) (1887) I. L.R. 15 Calc. 8.

was urged by Mr. Hill that the suit was not a suit for rectification but the issues framed in the lower Court are wide enough to enable us to deal with these points, to which indeed the evidence was mainly directed.

In regard to costs, I am inclined to think that as the plaintiff charged fraud and failed and has also substantially failed on the whole case, he should pay the whole of the costs of defendant No. 1. But I am not prepared to go so far as to differ on this point from the order which my learned brother proposes to make.

With these observations, I concur in the conclusions which have been arrived at.

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*Appeal allowed in part ;
cross-appeal dismissed.*

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

HUDSON v. MORGAN.*

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Receiver—Appeal—Civil Procedure Code (Act XIV of 1882), ss. 503, cl. (b) ; 588, cl. (24)—Stranger in possession of property in suit—Lien on property—Jurisdiction of Court when ousted—Rights of Stranger against Receiver—Possessory Lien—Possession by Receiver.

Where in a mortgage suit a Receiver appointed by Court was directed to take possession of the property in custody of a person not a party to the suit :—

Held, that such an order was made under s. 503, cl. (b) of the Civil Procedure Code (Act XIV of 1882), and was appealable under s. 588, cl. (24).

Where a stranger to a suit claims under a title paramount to that of the parties, the jurisdiction of the Court is not ousted by the mere assertion of the existence of the circumstance, but upon proof of the actual existence of such circumstance and upon judicial investigation.

Budh Singh Dudhuria v. Niradbaran Roy (1) and *Mahomed Medhi Galistana v. Zoharra Begum* (2) followed.

* Appeal from order, No. 9 of 1909, against the order of Purna Chandra Chowdhuri, Subordinate Judge of Mozufferpore, dated Dec. 11, 1908.

(1) (1905) 2 C. L. J. 431, 437.

(2) (1889) I. L. R. 17 Calc. 285.

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Hurree Persad Malee v. Koonjo Behary Shaha (1), *Chunder Koomar Mundul v. Bakur Ali Khan* (2), *Sashti Charan Chatterjee v. Tarak Chandra Chatterjee* (3), *Mahomed Wahiduddin v. Hakiman* (4) and *Mayor of London v. Cox* (5) referred to.

The possessory lien of an agent attaches only upon goods or chattels in respect of which the principal has, as against a third person, the right or power to create a lien; such lien is confined to the rights of the principal in the goods or chattels at the time when it attaches, and is subject to all the rights and equities of third persons available against the principal at that time.

Attorney General v. Freeman (6), *Attorney General v. Walmsley* (7), *Manningford v. Taleman* (8), *In re Llewellyn* (9) and *Peat v. Clayton* (10) referred to.

APPEAL by Rowland Hudson, the intervenor.

The respondents, John Pierpont Morgan and others, who were carrying on business in Calcutta under the name and style of the Development Company, appointed the appellant Rowland Hudson, by a power-of-attorney, dated the 29th June 1904, to represent them and to take charge of all property, moveable and immoveable, and to superintend, manage, cultivate, carry on and conduct their establishment and business in India. Subsequently the appellant by an agreement, dated the 4th October 1905, became the Managing Director of The Indian Development Company for a term of five years on a salary of Rs. 1,250 a month and commission upon net profits, so that the total remuneration might not be less than Rs. 1,500 a month, with proviso that either party may determine the contractual relationship by giving 12 calendar months' notice of his intention to do so, and the Company might, in lieu of such notice, determine it upon the payment to the appellant the salary for one year calculated from the date of such determination. The appellant resigned the office of Director under the agreement on the 20th July 1906, but his services were not dispensed with by the Company till the 26th May 1908 after the Com-

(1) (1862) Marshall 99.

(2) (1868) 9 W. R. 598.

(3) (1871) 8 B. L. R. 315;
 15 W. R. 9 (F. B.).

(4) (1898) I. L. R. 25 Calc. 757.

(5) (1867) L. R. 2 H. L. 239, 261.

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(6) (1843) 11 M. & W. 694.

(7) (1843) 12 M. & W. 179.

(8) (1845) 1 Coll. 670;
 66 R. R. 239.

(9) [1891] 3 Ch. 145.

(10) [1906] 1 Ch. 659.

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pany had gone into liquidation on the 14th May 1908. In the meantime, the Company had appointed Messrs. Octavius Steel & Co. as their attorneys by a power-of-attorney, dated 30th May 1906, which, amongst other things, provided that the power-of-attorney previously granted by the Company to Hudson on the 29th June 1904, and all powers executed by him thereunder were to remain in full force and effect, until they were revoked by the Company or by Messrs. Octavius Steel & Co. under the power in their favour.

The Company had executed two mortgages on the 22nd January 1908, the first in favor of the plaintiffs, John Pierpont Morgan and others, and the second in favour of Harman Klienwort and others. The first mortgagees filed a suit to enforce their security in May 1908 and, on an application under section 503 of the Civil Procedure Code, Mr. Clarke was appointed a Receiver by the Subordinate Judge, and his appointment was sanctioned by the District Judge on the 12th May 1908. On the 26th May 1908, on approval of the security offered by Mr. Clarke, he was authorized to commence work as Receiver in accordance with the order of the 12th May 1908, and the Receiver, in pursuance of such order, took possession of all the property, except the portion in possession of Mr. Hudson.

On the 11th December 1908, the Subordinate Judge, on an application by the Receiver for an order directing Mr. Hudson, the appellant, to make over the properties in his possession which he had retained possession of on the ground that he had a lien on them under sections 217 and 221 of the Indian Contract Act (IX of 1872) in respect of money due to him for one year's salary in lieu of notice, and also for commission and allowance due to him, and, on the materials placed before him on the affidavit of both sides, ordered Mr. Hudson to make over the properties to the Receiver.

Against this order Mr. Hudson appealed to the High Court, and pending the appeal obtained a Rule (being Rule No. 102 of 1909) for the stay of proceedings and an *ad interim* stay.

The Rule and the appeal were heard together.

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Mr. Zorab (Babu Joygopal Ghose and Babu Manmat^{Mundul} Mookerjee with him), for the respondents, raised a preliminary^{Chatterjee} objection that the order of the 11th December 1908 was^{Cox (5)} appealable. [The objection was overruled.] ^{'s in}

Mr. J. E. Godfrey (Babu Lalit Mohan Banerjee with him^{er}) for the appellant. The Subordinate Judge had no jurisdiction^s to make the order of the 11th December 1908 on the materials before him; that the appellant claimed a lien on the property and the Receiver in order to obtain possession from him should file a suit so that the various questions relating to the lien claimed, the nature of the possession and the agreement of parties that would arise, might be properly gone into; that all that was necessary for the appellant to establish was a *prima facie* case of lien and that was obvious on the undisputed facts under sections 217, 221 of the Contract Act, as he was undoubtedly an agent of the Company: see section 182, Indian Contract Act (IX of 1882) and Story on Agency, pp. 2-3.

If the Subordinate Judge had jurisdiction in making the order, the appellant was entitled to retain possession until his claim for money due for remuneration payable and for commission and services in respect of the property was satisfied, and that this lien was available against the Receiver just as much as it was against the mortgagor.

Mr. Zorab, for the respondents. The order of the 12th May 1908 appointing the Receiver not being challenged in time by the appellant, no appeal lies: that the appellant is an officer or servant of the Company and not an agent, and that consequently he has no juridical possession and that his custody of the properties which undoubtedly belonged to the mortgagees is on their behalf and is liable to be terminated at the instance of the Receiver appointed by the Court in the mortgage suit, and even if it be assumed that the appellant has a possessory lien his right to possession cannot prevail against the mortgagees or the Receiver appointed by the Court at their instance; and that the claim did not arise until after the appointment of the Receiver on the 12th May 1908.

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Mr. Godfrey, in reply, pointed out that it was not open to the respondents to argue that the appellant was only a servant of the Company as they had never cancelled the power-of-attorney appointing him agent, as they might have done ; and that even on the 12th May 1908 his claim for so much of the current month was in fact in existence.

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Cur. adv. vult.

MOOKERJEE AND CARNDUFF JJ. We are invited in this appeal to discharge an order made by the Court below under section 503 of the Code of Civil Procedure of 1882, under which one of the respondents, the Receiver appointed in a mortgage suit, is authorized to take possession of properties in the custody of the appellant who is not a party to the mortgage suit. In order to appreciate the grounds upon which the propriety of the order is questioned, it is necessary to narrate the circumstances under which it has been made.

On the 29th June 1904, the appellant, Rowland Hudson, was, under a power-of-attorney executed by one of the respondents known as The Indian Development Company, appointed their attorney, and authorized to take possession of all property, moveable and immoveable, belonging to the latter and to superintend, manage, cultivate, carry on and conduct their estate and business in India. On the 4th October 1905, Hudson entered into an agreement with the Company, under which it was arranged that he would act as Managing Director for a term of five years from the 1st July 1905. The agreement provided that while either party might determine the same by giving twelve calendar months' written notice of his intention to do so, the Company might, in lieu of giving notice, at any time determine it upon payment to Hudson of salary for one year calculated from the date of such determination. The agreement further provided that Hudson as Managing Director was to receive a salary of Rs. 1,250 a month, besides Director's fees and a commission upon the net profits, so that his total remuneration might not be less than Rs. 1,500 a month. On the 30th May 1906, the Company appointed

Steel & Co. as their attorneys, but by this deed it was provided that the power-of-attorney previously given to the Company to Hudson on the 29th June 1882, all powers executed by him thereunder, were to remain in full force and effect, until they were rescinded by the Company or by the new attorneys under the deed in them. Meanwhile, there had been a correspondence between Secretary of the Company and Hudson in the capacity of the latter, and on the 20th July 1906 Hudson resigned his Managing Directorship. On the 22nd January 1908 the Company executed two mortgages, the first in favour of the present plaintiffs, John Pierpont Morgan and others, and the second in favour of Harman Klienwort and others. The mortgages, under the terms of the contract with them, were to be void if the mortgagees were informed that the property was in the nature of an English mortgage, and were entitled to possession upon default of payment. On the 1st of May 1908, the first mortgagees commenced an action to enforce their security and made an application under Order 10 of the Civil Procedure Code for the appointment of a Receiver for the better management of the mortgaged property. The Subordinate Judge made an order for the appointment of a Receiver on that very day, and nominated Octavius Steel & Co. as a fit and proper person. On the 12th May 1908, the District Judge approved the nomination, and Mr. Clarke was appointed Receiver in pursuance of delegation for local management and power to raise finances. The Receiver was called upon to furnish security to the extent of three lakhs of rupees within seven days of the 19th May following, the period within which the security was to be furnished was extended to the 26th May, and on the latter date, it was reported that security had been furnished.

The security was approved and Mr. Clarke was called upon to commence work as Receiver in accordance with the terms of the deed of the 12th May. Meanwhile, on the 14th May, the Company went into liquidation, and on the 26th May 1908, the

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services of Hudson were dispensed with. The Receiver took possession of all the mortgaged properties, excepting the portions now in dispute which were in the possession of Hudson. The latter on the 22nd June 1908 informed the Receiver that he claimed a lien on the properties in his possession under sections 217 and 221 of the Indian Contract Act, for one year's salary due to him, as his services had been dispensed with without notice, as also for the salary and allowances due to him from the 1st to the 26th of May 1908. The Receiver reported the matter to the Court, and upon the materials placed before the Subordinate Judge in the affidavits of both sides, he directed on the 11th December 1908 that Hudson should make over the properties in his custody to the Receiver. Hudson has now appealed to this Court, and on his behalf, the validity of the order has been attacked substantially on two grounds; namely, *first*, that as he is not a party to the mortgage suit, it is not competent to the Court to deprive him of possession of the properties in dispute; *secondly*, that, if the Court has jurisdiction to deal with the matter, he has a statutory lien upon the properties, which entitles him to retain possession as against the Receiver. In answer to these contentions, it has been argued on behalf of the respondents, *first*, that the appeal is incompetent, inasmuch as the first order of the 12th May 1908, by which the Receiver was appointed, was not challenged in time; *secondly*, that the position of the appellant is not that of an agent of the Company but of an officer or servant, that he has consequently no juridical possession, and that his custody of the properties which undoubtedly belonged to the mortgagors is on their behalf and is liable to be terminated at the instance of the Receiver appointed in the mortgage suit; and *thirdly*, that even if Hudson be assumed to have a possessory lien, his right to possession cannot prevail as against the mortgagees or the Receiver appointed by the Court at their instance.

As regards the preliminary objection taken on behalf of the respondents, we are of opinion that there is no substance in it. The order of the Subordinate Judge of the 11th December 1908, under which the Receiver is authorized to remove Hudson and

would have made an appropriate provision to that effect. On the other hand, the Code expressly provides for the test to be applied in cases of controversy between the Receiver and a stranger to the suit. It is argued, however, by the learned counsel for the appellant that as soon as the stranger asserts a paramount title, the Court must stay its hands. In our opinion, this argument is opposed to reason and principle. If this were the true rule of law, the action of the Court might be paralysed by the groundless assertion of an entirely unfounded claim. But as was pointed out by this Court in the case of *Budh Singh Dudhuria v. Niradbaran Roy* (1), it is an elementary principle that when the jurisdiction of a Court to take cognisance of a matter brought before it is disputed, the Court must adjudicate upon the question. The jurisdiction of the Court is ousted, not by the mere assertion of the existence of the circumstances under which the Court loses its jurisdiction, but upon proof of their actual existence. As illustrations of the application of this doctrine, it is sufficient to refer to the cases of *Hurree Persad Malee v. Koonjo Behary Shaha* (2), *Chunder Koomar Mundul v. Bakur Ali Khan* (3), *Sashti Charan Chatterjee v. Tarak Chandra Chatterjee* (4), *Mahomed Wahiduddin v. Hakiman* (5), and to the observations of Mr. Justice Willes in *Mayor of London v. Cox* (6). If the jurisdiction of the Court is disputed, the matter must be judicially investigated. The view we take is supported by the observations of Mr. Justice Pigot in *Mahomed Medhi v. Zoharra Begum* (7), where that learned Judge pointed out that when a person who is a stranger to the suit seeks to retain possession as against the Receiver appointed at the instance of the parties to the litigation, it is proper for, and perhaps absolutely incumbent on the Court to make an order for an enquiry, because whatever may be the least expensive course, consistent with satisfactory enquiry, ought to be adopted in order that the Court shall not

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(1) (1905) 2 C. L. J. 431, 437.

(4) (1871) 8 B. L. R. 315.

(2) (1862) Marshall 99.

(5) (1898) I. L. R. 25 Calc. 757.

(3) (1868) 9 W. R. 598.

(6) (1867) L. R. 2 H. L. 239, 261, 263.

(7) (1889) I. L. R. 17 Calc. 285.

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by its dominant power hold the property on which the parties to the suit have no claim and hold it in despite of the real owners ; if the Court can find out who the real owners are, it should do so and in the least expensive manner. No doubt, when the question arises whether the Court should remove from possession a person who is a stranger to the suit, the Court has a discretion which must be exercised judicially and not arbitrarily. But the view that the mere assertion of a paramount title compels the Court to withhold its hands cannot be supported. Substantially the same principle has been adopted in the English and American Courts. Thus, it has been ruled in England that although the effect of the appointment of a Receiver is to remove the parties to the action from the possession of the property, if at the time when a Receiver is appointed, a party claiming a right in the subject-matter under a title paramount to that under which the Receiver is appointed is in possession of the right which he claims, the appointment of the Receiver leaves him in possession : *Evelyn v. Lewis* (1), *Bryant v. Bull* (2), *Wells v. Kilpin* (3), *Underhay v. Read* (4). In the American Courts, also, when a Receiver comes into conflict with third persons, such third persons are, it appears, permitted to come in and be heard in relation to their interests or they are given leave to bring a suit against the Receiver to test the question of their rights. In other words, as observed in *Alderson on Receivers*, section 193, "the Court will, in general, entertain such an application on affidavits only where it clearly appears that the adverse possession began subsequent to the commencement of the action and is therefore subject to the decree or order which has been made, or where the person holding the property has no legal right ; but, as a rule, wherever the testimony is conflicting, and there is a reasonable ground for difference of opinion as to which is entitled to possession of the property, the Court will not assume to try the title by hearing a motion for a "writ of

(1) (1844) 3 Hare 472.

(2) (1878) 10 Ch. D. 155.

(3) (1874) L. R. 18 Eq. 298.

(4) (1887) 20 Q. B. D. 209.

assistance": *Musgrave v. Gray* (1), *Gelpeke v. Milwaukee* (2), *Vincent v. Parker* (3). It is obvious, therefore, that we must determine whether the Receiver is entitled to possession as against the appellant, by the application of the test, whether or not the parties to the suit or some or one of them have or has a present right so to remove him.

The second ground taken on behalf of the appellant raises the question, whether he has a possessory lien entitled to precedence over the right to possession of the Receiver. As we have already stated, the appellant founds his claim on the lien of an agent, while the respondent strenuously contends that he was merely a servant and not an agent. It is unnecessary for our present purposes to determine this question, and in view of the possible litigation between the parties in which the true character of the status of the appellant may be in controversy, we ought not to prejudge it. We shall assume, therefore, that the appellant was an agent of the Company within the meaning of sections 217 and 221 of the Indian Contract Act. But the question still remains, whether he has a preferential title to possession as against the Receiver. This brings us to the consideration of the third point taken on behalf of the respondents.

It is well settled that the possessory lien of an agent attaches only upon goods or chattels in respect of which the principal has, as against a third person, the right or power to create a lien; such lien is confined to the rights of the principal in the goods or chattels at the time when it attaches and is subject to all the rights and equities of third persons available against the principal at that time. We need not consider the case of money or negotiable securities deposited with the agent, because no question as to how far they may be affected by the rights or equities of third persons arises in the case before us. It is sufficient to say that the lien of the agent on property and goods is only given against third parties so far as the principal

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(1) (1898) 123 Alabama 376 ;
82 Am. State Rep. 124.

(2) (1860) 11 Wis. 454.
(3) (1838) 7 Paige N. Y. 65.

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himself has rights and interests in the property : *Attorney General v. Freeman* (1), *Attorney General v. Walmsley* (2), *Manningford v. Taleman* (3), *In re Llewellyn* (4), *Peat v. Clayton* (5). Upon the assumption, therefore, that the appellant has a lien, he can enforce it subject to the rights of the parties as they existed at the moment when his lien accrued. His services were dispensed with on the 26th May 1908 and any possible lien, therefore, which he can claim accrued on that date. The Receiver, however, had been appointed on the 12th May previously, and it admits of no doubt that his title to possession accrued on that date ; for as regards the rights of third persons, the appointment of a Receiver does not take effect or date back by relation to a period prior to his appointment. It seems to us also that the appointment of the Receiver is complete on the entry of an order of appointment, although he may not be able to take actual possession of the property until the security is approved. The Receiver, therefore, took the property as it was on the 12th May 1906, for where property, on which there are valid liens existing at the time of his appointment, has come into possession of the Receiver, the Receiver must clearly hold the same subject to such liens, and his appointment cannot divest the lien previously acquired in good faith,—a view which we find has been taken by the Supreme Court of the United States : *Quincey v. Humphreys* (6) ; High on Receivers, section 138 ; Beach on Receivers, section 202. Now what was the condition of the property on the 12th May 1908 ? On that date there was a valid English mortgage created in favour of the plaintiffs, on the the 22nd January 1908, under which the mortgagees were entitled to possession upon default of payment and to have a Receiver appointed by the Court. On what principle, then, can it be contended that the lien of the appellant, assuming that he has a statutory lien as an agent under sections 217 and 221 of the Indian Contract Act, prevail against the rights of

(1) (1843) 11 M. & W. 694.

(2) (1843) 12 M. & W. 179.

(3) (1845) 1 Coll. 670 ; 66 R. R. 239.

(4) [1891] 3 Ch. 145.

(5) [1906] 1 Ch. 659.

(6) (1891) 145 U. S. 82.

the mortgagees ? It was suggested that the lien under which the plaintiff claims, came into existence on the 14th May 1908 when the Company went into liquidation, because from that moment the Company must be taken to have, by implication, dispensed with his services. Even if we assume this contention to be correct, it does not in any way affect the question at issue, because in the view we take, the lien set up by the appellant cannot prevail either over the rights of the mortgagees or of the title to possession of the Receiver appointed at their instance. We must hold, therefore, that although the appellant is a stranger to the mortgage suit, he is liable under section 503 of the Code to be removed from possession, because at the time when the Receiver was appointed, his lien had not accrued, and the mortgagees plaintiffs had a present right to remove him.

The result is that the appeal fails and must be dismissed with costs.

The Rule which was obtained for an *ad interim* stay of proceedings must also be discharged. We make no order as to costs in the Rule.

S. A. A. A.

Appeal dismissed.

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APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

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Partition—Estates Partition Act (Bengal VIII of 1876), s. 63, and (Bengal V of 1897), s. 2, cl. (b)—Private Partition—Partition Proceedings commenced under Act V of 1876 (B.C.) whether governed by Act V of 1897 (B.C.)—Partition by Collector, whether open to objection—Limitation Act (XV of 1877), Sch. II, Art. 14—Order-Sheet, ex parte entry in—Specific Relief Act (I of 1877), s. 42—Dispossession during pendency of suit—Plaint, amendment of.

Where a partition proceeding commenced under s. 63 of Act VIII of 1876 (B.C.) before Act V of 1897 (B.C.) came into operation, and the Subordinate Judge decided that the suit was not maintainable under the provisions of Act V of 1897 (B.C.):

Held, that under s. 2, cl. (b), Act V of 1897 (B.C.), where a suit had been instituted under Act VIII of 1876 (B.C.), all subsequent proceedings for partition must be carried on under Act VIII of 1876 (B.C.) as if Act V of 1897 (B.C.) had not been passed, and the question of the maintainability of the suit should have been determined with reference to the provisions not of Act V of 1897 (B.C.) but of Act VIII of 1876 (B.C.)

Where an application for partition fulfilled the requirements of ss. 18 and 19 of Act VIII of 1876 (B.C.) and objection under s. 12 of Act VIII of 1876 (B.C.) was disallowed by the Collector, and the order of the Collector was upheld by the Board of Revenue, and the partition was proceeded with:

Held, that under s. 12 of Act VIII of 1876 (B.C.) the Collector had no jurisdiction to make the partition.

Where the Board of Revenue on appeal decided that the private partition set up was not established and the Collector proceeded with the partition, and subsequently in a suit to set aside the partition by the Collector it was decided by the Subordinate Judge that the finding of the reality of the alleged partition by the Revenue Court was conclusive and that the Civil Court had no jurisdiction to investigate the competency of the Collector to make the partition in view of s. 12 of Act VIII of 1876 (B.C.):

Held, that the Civil Court was competent to decide the matter in controversy, and that, therefore, the suit was maintainable.

* Appeal from Original Decree, No. 172 of 1907, against the decree of Ambika Charan Dutt, Addl. Sub. Judge of Darbhanga, dated March 9, 1907.

Where in a partition suit commenced under Act VIII of 1876 (B.C.), the provisions of s. 25 of Act V of 1897 (B.C.) were applied, and it was decided that the suit was barred :

Held, that provisions of s. 25 of Act V of 1897 (B.C.) were not applicable but the corresponding section of Act VIII of 1876 (B.C.), and that the suit was not barred under that section or under Art. 14 of the Limitation Act (XV of 1877).

Laloo Singh v. Purni Chander Banerjee (1), *Raj Chandra Roy v. Fazijuddin Hossein* (2), *Narendra Lal Khan v. Jogi Hari* (3) and *Alimuddin v. Ishan Chandra Dey* (4) referred to.

Parbati Nath Dutt v. Rajmohun Dutt (5) distinguished.

An *ex parte* entry in the order-sheet of the Collector is no evidence of possession of a party.

Mir Tapurah Hossein v. Gopi Narayan (6) referred to.

An amendment of the plaint would be allowed when the plaintiff had been dispossessed during the pendency of the suit, so as to make it appropriate to a suit for possession.

Jugdeo Singh v. Habibullah Khan (7) followed.

APPEAL by Ananda Kishore Chowdhry and others, the plaintiffs.

The plaintiffs appellants are the members of a joint Hindu family and the owners and proprietors of 8 annas share of Mehal Rohan Bhowanipur, original with dependencies pargana Ahis, bearing Touzi Nos. 1 and 2, and the defendants respondents, the owners of the remaining 8 annas share of the said mehal.

The plaintiffs alleged that the said mehal had been partitioned between the ancestors of the plaintiffs and the defendants and the plaintiffs' ancestors and thereafter the plaintiffs held possession of the 8 annas share of the said mehal which fell to their lot, and that the said privately partitioned *putties* were settled and confirmed by a judgment of the Subordinate Judge of the Tirhut, dated the 5th July 1856; and that under a survey operation which was completed in 1309 *Fusli*, the private partition was allowed to stand, except that 129 bighas 10 cottas 8 dhur of land of the said mehal were kept joint by the Survey officers.

(1) (1896) I. L. R. 24 Calc. 149.

(2) (1904) I. L. R. 32 Calc. 716.

(3) (1905) I. L. R. 32 Calc. 1107.

(4) (1906) I. L. R. 33 Calc. 693.

(5) (1901) I. L. R. 29 Calc. 367.

(6) (1907) 7 C. L. J. 251, 262.

(7) (1907) 6 C. L. J. 612.

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It was also alleged that partition proceedings started by the defendant in 1884 before the Collector of Darbhanga, the plaintiffs' objection that the mehal had already been privately partitioned, and that the Collector could not partition it again prevailed, and the petition for partition dismissed on the 14th of July 1895. But on appeal by the defendants to the Commissioner of Patna, the order of the Collector was reversed and the partition proceedings ordered to be proceeded with, and the same was confirmed, on appeal, by the Board of Revenue subsequently.

The cadastral-survey operations commenced in 1307 *Fusli*, corresponding with 1899-1900, and the *putties* of the plaintiffs and the defendants as formerly partitioned under the private partition allowed to remain in tact, and the objections of the defendants to the same rejected, and the order made absolute on the 22nd February 1899: that thereafter the partition proceedings were again taken up, and the plaintiffs filed an objection on the basis of the aforesaid survey papers, which was rejected on the 25th April 1902; and an appeal by the plaintiff from the said order was dismissed by the Commissioner on the 25th September 1902.

The Deputy Collector proceeded with the partition proceedings. The plaintiffs thereupon filed an objection on the 23rd September 1904, which was rejected on the 3rd April 1905, and the appeal against the said order dismissed by the Collector on the 26th April 1905, and by the Commissioner on the 31st July 1905, and by the Board of Revenue on the 21st December 1905. The partition proceedings went on and the case was sent up to the Collector of Darbhanga under section 58 of Act V of 1897 (B.C.) for his approval of the taktabandi, in the absence of the plaintiffs, and the same was approved of by the Collector on the 8th March 1906. The plaintiff thereupon brought the present suit for a declaration that the properties, the subject-matter of the suit, having been privately partitioned, could not be partitioned again by the Collector under the Estates Partition Act. The Subordinate Judge dismissed the plaintiffs' suit. Against that decision the plaintiffs appealed to the High Court.

Babu Jogesh Chandra Roy and Rajendra Chandra Guha, for the appellants, contended, *first*, that the suit was not maintainable under the provisions of Act V of 1897; *secondly*, that it was barred by limitation under section 25 of Act V of 1897; *thirdly*, that under section 119 of Act V of 1897 the plaintiffs were precluded from questioning the validity of the order made by the Revenue Court; and *fourthly*, that the suit was barred under section 42 of the Specific Relief Act.

Babu Satish Chandra Ghose, for the respondents, contended that the decision of the Revenue Courts upon the question of the reality of an alleged private partition was conclusive between the parties, and the Civil Court had no jurisdiction to investigate whether or not it was competent to the Collector to make the partition in view of the provisions of section 12 of Act VIII of 1876 read with section 148 of that Act. Reference was made to sections 11, 21, 31, 32 and 149 of the same Act and to *Raj Narain Das v. Shama Nando Das Chowdhry* (1).

MOOKERJEE AND CARNDUFF JJ. This is an appeal on behalf of the plaintiffs in a suit for declaration that the immovable properties, which form the subject-matter of litigation, had been privately partitioned and could not form the subject-matter of partition by the Collector under the Estates Partition Act. There has been no investigation into the facts of the case, but the Subordinate Judge has dismissed the suit on several preliminary grounds, namely, *first*, that the suit was not maintainable under the provisions of Act V of 1897; *secondly*, that it was barred by limitation under section 25 of that Act; *thirdly*, that under section 119 of the Act, the plaintiffs were precluded from questioning the validity of the order for partition made by the Revenue Court; and *fourthly*, that the suit was barred under section 42 of the Specific Relief Act.

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Subordinate Judge on each of the above points is erroneous and that the case ought to be tried on the merits. In our opinion, this contention is well-founded and must prevail.

It is obvious as regards the first ground that the Subordinate Judge has committed a serious error in applying the provisions of Act V of 1897 to the circumstances of this case. It appears that proceedings were commenced before the Collector for partition of the estate so far back as 1884, and from the papers placed before us, it is fairly clear that the order under section 63 of Act VIII of 1876, which was in force when the partition proceedings were commenced, must have been made before 1897 when the Act now in force came into operation. We hold, therefore, that under section 2, clause (b) of Act V of 1897, all subsequent proceedings for partition must be carried on under Act VIII of 1876, as if Act V of 1897 had not been passed. It follows consequently that the Subordinate Judge ought to have determined the question of the maintainability of the suit with reference to the provisions, not of Act V of 1897 but of Act VIII of 1876. Now, let us turn for a moment to the provisions of Act VIII of 1876 and see whether the present suit is barred. Section 12 of Act VIII of 1876 provides that no partition of an estate in which private division has already been made is to be made by the Collector except on a joint petition of all the proprietors or by an order of the Civil Court. In other words, in a case in which it is established that an estate has been privately partitioned, the Collector has no jurisdiction to partition it again under the Estates Partition Act, except in one or other of two contingencies, namely, either upon the joint petition of all the proprietors or by the order of the Civil Court. Section 21 provides that, if, in the opinion of the Collector, the application for partition fulfils the requirements of sections 18 and 19, that is, is in proper form and is accompanied by the necessary documents, and if in his judgment there does not appear to be any objection to the making of the partition, he may invite objections thereto—one of the objections may be under section 12 of the Act, for any of the proprietors upon issue of

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of the Civil Court, makes it fairly obvious that an order under section 32 of the description now before us was not intended to be excluded from challenge in a Civil Court. In our opinion the policy which underlies section 149 is clearly against the contention of the respondent. The object obviously is to exclude the jurisdiction of the Civil Court in cases where the question relates to the division of the Government revenue or to the details of the partition. Where, however, the question raised goes to the very root of the matter and relates to the jurisdiction of the Collector to make a partition in spite of the provisions of section 12 of the Act, it is impossible to hold that the Civil Court is not competent to decide the matter in controversy between the parties. The view taken by the Subordinate Judge that the suit is not maintainable cannot, therefore, be supported.

The second ground upon which the Subordinate Judge has dismissed the suit is that it is barred by limitation under section 25 of the Estates Partition Act. Here also the Subordinate Judge has fallen into error in relying upon the provisions of Act V of 1897. The question, however, remains whether the suit is barred under the corresponding section of Act VIII of 1876. Section 26 of that Act provides that no suit instituted in a Civil Court by any person claiming any right or title in the parent estate after the lapse of four months from the issue of an order of the Collector under clauses (a) and (b) of section 24 or after the lapse of four months from the issue of an order of the Collector under section 31 declaring the estate to be under partition, shall avail to stay or affect the progress of any proceedings which shall have been taken under the Act for the partition of the estate; and all rights which may be conferred on any person by the final decree in such suit shall be subject to such proceedings in the manner hereinafter provided. This section has to be read with the provisions of section 24, and if the two sections are taken together, there cannot, in our opinion, be any doubt that section 26 has no application to the circumstances of the present case. Section 24 prescribes the procedure to be followed when the

objection raises any question of title or right. Section 26 then provides that if the objector institutes a suit to have his title or right established, and if he succeeds in the litigation, the decree of the Civil Court is to be subject to the result of the partition proceedings before the Collector; in other words, the successful litigant before the Civil Court takes the allotment which would otherwise have fallen to his opponent. It is clear, therefore, that the suit is not barred by the provisions of section 26 of Act VIII of 1876, nor can it be suggested that the suit is barred under the provisions of Art. 14 of the Limitation Act. That article no doubt provides that a suit to set aside any act or order of an officer of Government in his official capacity, not otherwise expressly provided for, must be commenced within a year from the date of the act or order. It has been held, however, in the cases of *Laloo Singh v. Purna Chander Banerjee* (1), *Raj Chandra Roy v. Fazijuddin Hossein* (2), *Narendra Lal Khan v. Jogi Hari* (3) and *Alimuddin v. Ishan Chandra Dey* (4) that an order made without jurisdiction is a nullity and need not be set aside; to an order of this description, Art. 14 has no application. The case of *Parbati Nath Dutt v. Rajmohun Dutt* (5) in which an apparently contrary view was taken is really distinguishable. In that case it was held that a suit by a party to an enquiry under section 116 of Act VIII of 1876 (against whom there has been an adverse decision of the Revenue authorities), for a declaration that the land was part of his howla, was governed by Art. 14. There, however, the Revenue authorities had jurisdiction to pass the order, and as the plaintiff was a party to the order, it may be suggested that he was bound to set it aside before he could ask for any relief. If the contention of the plaintiff in the case before us is well-founded, that is, if it is established that there was a private partition as alleged in the plaint, the order of the Collector was clearly without jurisdiction in view of the provisions of section 12 of

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(4) (1906) I. L. R. 33 Calc. 693.

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Act VIII of 1876; and it would be wholly unnecessary for the plaintiff to have such order set aside. The suit is, therefore, not barred under Art. 14 of the Limitation Act.

The next ground upon which the Subordinate Judge has held that the suit is not maintainable is equally unfounded, for he has proceeded upon the provisions of section 119 of the Estates Partition Act, which has no application. This ground, therefore, cannot be supported.

The fourth and last ground upon which the Subordinate Judge has dismissed the suit is that as the defendants are in possession, the plaintiff cannot maintain a declaratory action, and, therefore, in view of the provisions of section 42 of the Specific Relief Act, the suit is bound to fail. It is pointed out, however, that upon the question of possession of the defendants, there is really no evidence on the record. The Subordinate Judge has relied apparently upon an entry in the order-sheet of the Collector to the effect that possession has been delivered to the defendants. In view, however, of the decision of this Court in *Mir Tapurah Hossein v. Gopi Narayan* (1) the entry in the order-sheet of the Collector is no evidence that the defendants are in possession. If the defendants allege that they are in possession the fact has to be proved. No doubt they may produce the return of the peon who is alleged to have given them possession, and the peon may also be examined. But the *ex parte* entry in the order-sheet by itself is no proof of possession as against the plaintiff. Apart from this consideration, however, it is fairly clear that if the defendants are now in possession, they must have obtained possession during the pendency of this suit. It is worthy of note that the order of the Collector which recites that possession has been delivered was made on the 29th January 1907 while the suit had been commenced on the 9th April 1906. The suit, therefore, could not be affected by an event which happened during its pendency: *Ram Ratan Sahu v. Mohant Sahu* (2) and *Waman Rao Damodar v. Rustomji Edalji* (3). The plaintiff, however,

(1) (1907) 7 C. L. J. 251, 262.

(2) (1907) 6 C. L. J. 74.

(3) (1896) 1. L. R. 21 Bom. 701.

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would be entitled, under circumstances like these, to ask for leave to amend the plaint so as to make it appropriate to a suit for possession. This is clear from the decision of this Court in *Jugdeo Singh v. Habibullah Khan* (1). Reliance was again placed by the respondents upon the decision of this Court in the case of *Raj Narain Das v. Shama Nando Das Chowdhry* (2), which, however, has been subsequently set aside on review.* But if that judgment were good law, the present case is clearly distinguishable, because there the dispossession had taken place before the suit was commenced; here the dispossession, if any, must have taken place after the commencement of the suit and the plaintiff cannot in any view be blamed for framing it as a declaratory action.

The result, therefore, is that this appeal must be allowed, the judgment and decree of the Subordinate Judge set aside, and the case remitted to him to be tried on the merits. The appellants are entitled to their costs in this Court.

As the suit was dismissed by the Court below on a preliminary ground, we direct that the Court fees paid by the appellants on the memorandum of appeal to this Court be returned to them under section 13 of the Court Fees Act.

S. A. A. A.

Appeal allowed.

(1) (1907) 6 C. L. J. 612.

(2) (1899) I. L. R. 26 Calc. 845.

* See I. L. R. 33 Calc. 1362.

ORIGINAL CIVIL.

Before Mr. Justice Harington.

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May 3.

Contract—Sale of Goods by Description—Appropriation by Vendor—Refusal to take Delivery—Reference to Arbitration—Evidence of Assent—Action for Goods bargained and sold—Suit for Price—Contract Act (IX of 1872), s. 120.

Where in a contract for the sale of goods by description the property in the goods has passed to the buyer, section 120 of the Indian Contract Act does not deprive the seller of the form of action for goods bargained and sold, and such an action can be brought for the price of the goods, on the buyer refusing to take delivery.

Mitchell Reid & Co. v. Buldeo Doss Khettry (1) distinguished.

A letter of reference signed by both buyer and seller, requesting arbitrators to ascertain whether certain specific bales of goods, appropriated by the seller to the contract, are inferior in quality to the goods deliverable under the contract, and whether an allowance ought to be made, is evidence of assent by the buyer to the appropriation.

ORIGINAL SUIT.

THIS suit was instituted by the plaintiffs' firm, Messrs. Finlay Muir & Co., for the price of certain goods bargained and sold.

By a contract dated March 7th, 1908, the plaintiffs agreed to sell and the defendants to buy fifteen bales of grey C. B. dhooties of a certain size and quality at Re. 1 per pair, for shipment in April-May 1908, each instalment to be considered a separate contract, delivery to be taken by the buyers within 90 days from arrival, the goods to be paid for in cash on or before delivery or on demand or after delivery, at the option of the sellers. Provision was made in the contract for interest and the extension of time allowed for delivery. Certain other material provisions in the contract were as follows :—

“(2) If the goods are not taken delivery of and paid for as herein agreed, the sellers may re-sell them or any portion of

* Original Civil Suit No. 58 of 1909.

(1) (1887) I. L. R. 15 Calc. 1.

them or at their option cancel this contract, and they have absolute discretion as to when and how to re-sell the goods ; any dispute as to damage, difference, inferiority, short quantity or measure or defect or amount of allowance to be referred to the Bengal Chamber of Commerce, whose decision shall be accepted by both parties as final and conclusive."

"(5) If the goods or any portion of same are shipped prior to the time stipulated, the buyers will not have the right of cancelling but will get extension of godown delivery if required for the period the goods are shipped prior to the time contracted for."

A number of bales of dhooties which had been shipped from England in the SS. *Sparta* by the plaintiffs' firm on the 4th March 1908, arrived in Calcutta on the 15th April. Fifteen bales out of this lot were selected by the plaintiffs' sale-master to be delivered to the defendants in fulfilment of the contract of the 7th March, and were divided into two lots—eight bales for the April shipment and seven bales for the May shipment. Out of the first lot of eight bales the defendants took delivery of two bales on the 16th April. An extension of time was granted under the terms of the contract for taking delivery of the remaining bales, which were to be delivered, six bales by the 13th August and the remaining seven bales by the 12th September 1908.

It was alleged by the defendants that, in ignorance of the actual date of shipment, they took delivery of the two bales for the purpose of satisfying themselves as to the quality and description of the consignment.

A few days after the two bales had been delivered, the defendants complained that they were inferior to sample and were damaged by mildew. An allowance of Rs. 15 per bale was accordingly made by the plaintiffs for mildew damage.

On the 22nd April 1908, a letter of reference, signed both by the plaintiffs and defendants, was submitted to the Bengal Chamber of Commerce. It was contended by the plaintiffs that this was a submission of the disputes between the parties to the arbitration of the Bengal Chamber of Commerce under

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clause 2 of the contract. The defendants contended that it was only for the purpose of surveying the goods to estimate the amount of allowance, which the plaintiffs should recommend their Home office to pay the defendants. The letter was addressed to the Registrar, Tribunal of Arbitration, Bengal Chamber of Commerce, and was as follows: "Under Regulation I, Part II of the Regulations of the above Tribunal, we the undersigned hereby apply for the appointment of two arbitrators and the issue of an award. We give particulars of the dispute below." The letter related to the inferiority in quality of the whole fifteen bales and the question of mildew damage was struck out. On the 6th May 1908, the arbitrators made their award to the effect that they found the goods were a fair tender in every respect and directed the buyers to take delivery of the same in terms of the contract.

On the 25th July 1908, the defendants' attorney wrote to the plaintiffs, stating that the defendants had ascertained that the goods tendered were not of the shipment contracted for, and claiming to cancel the contract on that ground.

In reply, the plaintiffs disputed the defendants' right to take this course. Further correspondence followed—the plaintiffs pressing the defendants to take delivery of the thirteen bales remaining undelivered under the contract, the defendants refusing to take them, on the ground that they were not of the shipment contracted for.

On the 21st January 1909, this suit was instituted by the plaintiffs for the sum of Rs. 7,971-9-6 being the price as well of the thirteen bales of dhooties which the defendants refused to take delivery of, as of the two bales delivered to the defendants, including interest. The claim of the plaintiffs for the price of the two bales delivered, was admitted by the defendants subject to an allowance for their damaged condition.

Mr. Buckland, for the defendants. This suit has been wrongly framed for the price of goods in an action for goods bargained and sold. No such action could lie under the Indian Contract Act. Where a buyer wrongfully refuses to accept the goods sold to him, the seller's only remedy under section 120

of the Contract Act, read with section 73, would be to sue for damages on the basis of the difference between the contract and market rates and not for the price of the goods : *Mitchell Reid & Co. v. Buldeo Doss Khettry* (1). Even if such an action would lie in India, it is essential, in order to found an action for bargain and sale, that the property in the goods should pass to the buyer, at the time the contract is effected. Subsequent appropriation would not be sufficient : Benjamin on Sale, 4th edition, pp. 1, 4, 5 ; *Scott v. England* (2), *Atkinson v. Bell* (3), *Dixon v. Yates* (4), *Simmons v. Swift* (5), *Cort v. The Ambergate Nottingham and Boston and Eastern Junction Railway Company* (6). In the present case, the property in the goods admittedly did not pass to the buyers at the time the contract was made. It is submitted that the property in the goods never did in fact pass to the buyers, who consistently refused to take delivery. There was no evidence of assent on the part of the buyers to the appropriation of the sellers : the letter of request did not amount to assent to appropriation ; *Mirabita v. Imperial Ottoman Bank* (7). Lastly, the tender was bad. Inasmuch as the contract was made on the 7th March 1908, and the goods were shipped on the 4th March, shipment before the date of the contract could not be said to be shipment *under* the contract.

Mr. Stokes (*Mr. B. C. Mitter* with him), for the plaintiffs. The Indian Contract Act does not deprive a seller of the form of action for goods bargained and sold, or disentitle him from suing for the price of goods. Precedent No. 10 in Schedule IV of the Civil Procedure Code of 1882 provides a form of pleading in such an action. *Mitchell Reid & Co. v. Buldeo Doss Khettry* (1) can have no application, as in that case it was found the property in the goods had not passed to the buyer. The proposition that an action for goods bargained and sold does not lie unless the contract consists of a perfect sale, is

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(1) (1887) I. L. R. 15 Calc. 1.

(4) (1833) 5 B. & Ad. 313, 340.

(2) (1844) 14 L. J. Q. B. 43.

(5) (1826) 5 B. & C. 857, 864.

(3) (1828) 8 B. & C. 277.

(6) (1851) 20 L. J. Q. B. 460.

(7) (1878) L. R. 3 Ex. D. 164.

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unsupported by authority. "Sale" by section 78 of the Contract Act also includes an agreement for sale. An action for bargain and sale lies the moment the property in the goods has passed to the buyer, whether this occurs at the time of contract or subsequently: see *Rohde v. Thwaites* (1) which has been incorporated as an illustration to section 83 of the Indian Contract Act, *Clive Jute Mills Co. v. Ebrahim Arab* (2), *Juggernath Augurwallah v. E. A. Smith* (3). As regards the authorities cited against me, *Scott v. England* (4) is really in my favour, and *Atkinson v. Bell* (5), and *Dixon v. Yates* (6) have no application to the present case. It is submitted that the property in the goods did actually pass to the buyers. The contract itself gave authority to appropriate, and the goods were selected and appropriated by the vendors. The fact that the buyers disputed the quality of the goods is evidence of their assent to the appropriation. The reference to arbitration is conclusive of the assent of the buyers to the appropriation. The admitted acceptance of the two bales by the buyers implies assent: *Buchanan v. Avdall* (7). The defence as to shipment must fail in the face of clause 5 of the contract.

Cur. adv. vult.

HARINGTON J. The plaintiffs' claim is for the price of goods bargained and sold; the defendants plead that the action does not lie and that the goods were not shipped under the contract.

The facts which have been proved or admitted before me are that by a contract dated March 7th, 1908, the plaintiffs agreed to sell, and the defendants to buy 15 bales of grey C. B. dhooties of the size and quality described in the contract at Re. 1 per pair; shipment to be in April-May 1908; delivery to be taken within 90 days of arrival; interest to be charged at 12 per cent. on payments made after 45 days from actual delivery.

(1) (1827) 6 B. & C. 388.

(2) (1896) 1 L. R. 24 Calc. 171.

(3) (1906) 1 L. R. 34 Calc. 173.

(4) (1844) 14 L. J. Q. B. 43.

(5) (1828) 8 B. & C. 277.

(6) (1833) 5 B. & Ad. 313.

(7) (1875) 15 B. L. R. 276.

A number of bales of dhooties arrived in the SS. *Sparta* on April 15th—fifteen bales out of this lot were selected by the plaintiffs' sale-master to be delivered to the defendants in fulfilment of this contract and were divided into two lots, eight bales for the April shipment and seven bales for the May shipment.

Out of the first lot of eight bales, the defendants took delivery of two bales on April 16th. An extension of time was granted under the terms of the contract for taking delivery of the remaining bales, which were to be delivered—six bales by August 13th and the remaining seven by September 12th. A few days after the two bales had been delivered, the defendants complained that they were inferior to sample and were damaged by mildew. An allowance of Rs. 15 a bale was accordingly made by the plaintiffs for mildew damage. The other questions were referred to the arbitration of the Bengal Chamber of Commerce under the latter portion of clause 2 of the contract of March 7th. The question of mildew damage was struck out in the letter of reference to the Chamber of Commerce. The plaintiffs say that this was because while they disputed the buyers' complaints as to inferiority of quality, they were quite prepared to allow an abatement of price for any mildew damage which might be proved. The defendants say they consented to strike out the words, because the plaintiffs promised that if the goods were mildewed the contract should be cancelled.

On this point I believe the plaintiffs and not the defendants. *First*, because I think it very improbable that the plaintiffs would have agreed to cancel the contract on account of mildew damage when it was customary in the trade, as stated by the defendants' witnesses, to make an allowance in respect of such damage. *Secondly*, because the defendants have not pleaded that the plaintiffs agreed to cancel the contract if the goods were proved to be damaged by mildew. *Thirdly*, because when the plaintiffs offered in their letter of October 17th, 1908, to make any reasonable allowance for damaged bales, the defendants' attorneys while objecting to take damaged bales said nothing about any promise by the plaintiffs to cancel the contract if the bales were damaged.

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The letter of reference to the Bengal Chamber of Commerce was signed by the plaintiffs and by the defendants on April 22nd, 1908, and related to the inferiority of quality of the whole fifteen bales. On May 6th the arbitrators made an award to the effect that they found that the goods were a fair tender in every respect, and that the buyers were to take delivery of them under the terms of their contract.

Nothing further was done until July 25th when Brojo Lal Mookerjee wrote to the plaintiffs claiming to cancel the contract on the ground that the goods were not of the shipment contracted for. In reply, the plaintiffs disputed the defendants' right to take this course.

Further correspondence followed: the plaintiffs pressing the defendant to take delivery of the bales under the contract, the defendants refusing to take them on the ground that they were not of the shipment contracted for. The correspondence ended with a letter of December 23rd, 1908, and on January 21st, 1909, the present suit was brought.

In the course of the trial the award of the arbitrators was tendered. It was objected to by Mr. Buckland on the ground that the agreement to submit to arbitration was contained in the contract of March 7th, and that contract did not bear the Lanna stamp required by Schedule I, Article 5 (b) of the Indian Stamp Act, 1899, and that as section 35 of the Act provides that instruments not duly stamped shall be acted on by any person having by consent of parties authority to receive evidence, the arbitrators were precluded from acting on it—their award, therefore, was made without authority and could not be admitted.

The plaintiffs contended that the contract of March 7th being an agreement relating to the sale of goods fell within exemption (a) to Article 5 of the Schedule and did not require stamp, and relied on *Kyd v. Mahomed* (1).

It is unnecessary to decide whether this objection is sound or not, because the admissibility of the award as evidence against the defendants does not depend on the submission to arbitra-

tion contained in the contract. The letter of April 22nd, signed by the defendants (as well as the plaintiffs), contains a request to the Bengal Chamber of Commerce for the appointment of two arbitrators and the issue of an award, and it sets forth in detail the buyers' complaints, and gives the numbers of the particular fifteen bales (37081-95) covered by the contract as to which the dispute has arisen. This letter clearly does not require a stamp, and any award made in pursuance of the authority contained in that letter is evidence against any person who signed the letter authorising the making of the award. The award is admissible in evidence against the defendants.

The learned counsel for the defendants contended that an action for goods bargained and sold would not lie, and that the only remedy the plaintiffs had was to sue for damages under section 120 of the Contract Act, and he cited the case of *Mitchell Reid & Co. v. Buldeo Doss Khettry* (1). But that was a case in which the property in the goods had not passed and so, clearly, a claim for goods bargained and sold was not sustainable. It does not lay down the proposition that where goods answering the description of the goods contracted to be sold have been sold to the buyer, and the property has passed to him, no action for goods bargained and sold can be brought. Section 120 of the Contract Act does not deprive a seller of this form of action which is recognised under the Civil Procedure Code of 1882: see Schedule IV, Form 10.

Next, the defendant says he can cancel the contract because the goods were shipped before the contract was made. I do not think that this contention is sound, because the parties have by clause 5 of the contract agreed that shipment prior to the stipulated time shall not give the buyers the right of cancelling, and, further, I believe that when the defendant took delivery of the two bales on April 16th he knew they were not of the April shipment. He says he did not, but he admits he has been seven or eight years in the piece-goods trade. I do not believe him when he says that notwithstanding his experience, that he did not know that it was impossible for

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goods arriving in a ship at Calcutta on April 15th to have been shipped during the month of April in Liverpool.

The substantial question in the case is whether the contract of March 7th has been converted into a complete bargain and sale by the appropriation of specific goods to the contract, in other words, whether the plaintiffs have only proved the breach of an agreement to sell sounding in damages, or have proved an actual sale passing the property in the goods and rendering the buyers liable to pay the agreed price therefor.

Now, there is evidence which has not been contradicted that the plaintiffs did by their sale-master select and appropriate fifteen specific bales to the contract in question.

The question then arises, did the defendant assent to the appropriation of these fifteen specific bales to the contract ?

I think that the defendants' letter to the Bengal Chamber of Commerce on April 22nd is evidence of an assent to the appropriation. They request the Bengal Chamber of Commerce by their arbitrators to ascertain whether these specific bales described by certain specific marks are inferior in quality to the goods deliverable under the contract. That seems to me to be consistent only with an assent to the plaintiffs' appropriation of those specific bales, and further, in their letter, they do not claim to be entitled to refuse the bales but say that they want an allowance. The position of the parties at the time of the reference was this. The plaintiffs had appropriated certain bales to the fulfilment of the contract with the defendants ; the defendants said they were of inferior quality and they wanted an allowance in respect of them. Both the plaintiffs and the defendants wrote authorising arbitrators to make an award on the question whether goods are inferior or not, and whether an allowance ought to be made.

In my opinion, the defendants consented to the appropriation, and the property in the goods passed to them.

The result is that the plaintiffs are entitled to judgment.

The defendants have not claimed to set off as against the price any compensation to which they would be entitled in the event of the goods being damaged by mildew. But both

parties have agreed that if it be held that the plaintiffs are entitled to recover, the question as to what abatement, if any, of the price the defendants ought to get in respect of mildew damage shall be referred. The reference will be to some gentleman agreed on between the parties : in the event of their being unable to agree, to the Official Referee.

The plaintiffs will be entitled to judgment for the amount claimed less the sum, if any, to which the Referee finds the defendants entitled in respect of mildew damage. Costs on scale 2. Liberty to apply to enter judgment in accordance with the Referee's report.

J. C.

*Judgment for plaintiffs.*Attorneys for plaintiffs : *Manuel & Agarwalla.*Attorneys for defendants : *Leslie & Hinds.*

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LETTERS PATENT APPEAL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Mookerjee.*

BASARAT ALI KHAN

v.

MANIRULLA.*

1909
June 2.

Lease—Covenant restraining Alienation—Assignment notwithstanding such covenant, whether operative.

A lease contained a covenant in these terms : " you (the lessee) shall not be able to dig pits and tanks or to transfer the land in any way without a letter from me to that effect." There was no right of re-entry reserved. The lessee assigned her interest under the lease :—

Held, that the assignment was operative notwithstanding the covenant.

Williams v. Earle (1) referred to.

APPEAL under section 15 of the Letters Patent by Basarat Ali Khan, the defendant No. 1.

* Letters Patent Appeal No. 34 of 1908, in Appeal from Appellate Decree No. 2316 of 1906.

(1) (1868) L. R. 3 Q. B. 739.

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This appeal arose out of an action by the plaintiffs to recover possession of a raiyati holding on declaration of title thereto. The defendant No. 2 had held a *kaimi raiyati* holding under the defendant No. 1 and she sold it to the plaintiffs by a registered *kobala* dated the 25th Chaitra, 1262 *Maghi*. After their purchase the plaintiffs served a notice on the landlord as required by the provisions of the Bengal Tenancy Act, who also accepted rent from them. In 1903 the landlord (defendant No. 1) brought a suit against defendant No. 2, the original lessee, for arrears of rent and obtained an *ex parte* decree, and in execution of that decree he purchased the holding at an auction sale on the 11th November 1903. The plaintiffs alleged that they were then dispossessed by the defendant No. 1, and hence the suit. The defendant No. 1, who contested the suit, pleaded that the suit was barred by limitation and that the plaintiffs had no title to the disputed land. It appeared that in the *kaimi* lease executed by defendant No. 2 in favour of defendant No. 1 there was a clause to the following effect—"You shall not be able to dig pits and tanks or to transfer the land in any way without a letter from me to that effect."

The Court of first instance found that the plaintiffs had established their case and gave them a decree. It further found that the holding was a permanent and transferable one, and that defendant No. 2 was not restricted from alienating the same by reason of the fact that there was the aforesaid clause in the lease. On appeal by the defendant No. 1, the learned Subordinate Judge of Chittagong affirmed the decision of the first Court.

The defendant No. 1 preferred a second appeal to the High Court, which was heard before Mr. Justice Brett sitting alone. The learned Judge relying upon the decision in the case of *Nilmadhab Sikdar v. Narattam Sikdar* (1), overruled the objection of the appellant that the assignment was not operative at any rate as between the lessor and lessee, and affirmed the decisions of the Courts below.

The defendant No. 1 then preferred this appeal under section 15 of the Letters Patent.

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Babu Mohendra Nath Roy (Babu Krishna Prosad Sarbadhicary with him), for the appellant. The learned Judge is wrong in holding that the covenant is void. Section 10 of the Transfer of Property Act does not apply, as the covenant in the lease is not in absolute restraint of transfer. Moreover, the condition is for the benefit of the landlord. Section 11 of the said Act has also no application. Sections 11 and 18 of the Bengal Tenancy Act cannot destroy rights created under a covenant. Section 11 of the Bengal Tenancy Act must be controlled by section 179 of the Act. Neither the Transfer of Property Act nor the Bengal Tenancy Act does make the covenant against assignment void. If the transfer is not binding upon the landlord the lessee remains liable for rent, and in execution of rent decree against the lessee the tenure passes, and the purchaser gets the tenure. The case of *Parameshri v. Vittappa Shanbaga* (1) shows that after the transfer the landlord can proceed against his tenant. Section 65 of the Bengal Tenancy Act creates a statutory charge on the tenure. Supposing that the condition in the present case is to be regarded merely as a condition which the lessee had to observe before transferring the holding, the principles laid down in *Shepherd and Brown's Transfer of Property Act*, at page 509, dealing with section 108 would apply, and the ordinary remedy of a lessor in a case of a breach of such a condition would be by a suit for injunction or for damages in the absence of a condition for re-entry.

Babu Dharendra Lal Khastgir, for the respondent, was not called upon.

JENKINS C.J. AND MOOKERJEE J. This appeal arises out of a suit for possession of property. On the 20th of October 1881, a permanent lease of the property in suit was executed by defendant No. 1 in favour of defendant No. 2, and in that lease

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was a covenant in these terms :—“ You (*i.e.*, the lessee) shall not be able to dig pits and tanks or to transfer the land in any way without a letter from me to that effect.” There was, however, no right of re-entry reserved. On the 7th of April 1901, the lessee purported to assign her interest under this lease to the plaintiff. Apart from the covenant, which I have read, there can be no question that the assignment was good, for all notices and formalities required by the Bengal Tenancy Act were given and observed. But it has been argued before us that the assignment was inoperative, at any rate as between the lessor and the lessee. The appeal in the first instance came before a learned Judge of this Court sitting alone, and he decided against the appellant’s contention on the ground that the covenant was void and, in support of that view, reliance was placed on a decision in the case of *Nilmadhab Sikdar v. Narattam Sikdar* (1). We are not at present prepared to support the decision of the learned Judge on that ground; but we think the assignment was operative, notwithstanding the covenant. In support of this view may be cited the case of *Williams v. Earle* (2), where in reference to a similar covenant it was said by Mr. Justice Blackburn, as he then was, that “ though there is a covenant binding on the defendant not to assign, the assignment is nevertheless operative;” and, on that footing, damages were awarded in that suit. It has been conceded in the course of this case, and it is the view that has been adopted by the Madras High Court in the case of *Parameshri v. Vittappa Shanbaga* (3), that a suit for damages would lie, and that involves the view that an assignment notwithstanding such a covenant would be operative. But if the assignment was operative, it necessarily follows that title did pass to the plaintiff and, if this be so, then the defendant No. 1 took nothing by his purchase in the execution proceedings. On this ground, we think the decision of the learned Judge was correct. We, therefore, dismiss the appeal with costs.

S. C. G.

Appeal dismissed.

(1) (1890) I. L. R. 17 Calc. 826.

(2) (1868) L. R. 3 Q. B. 739.

(3) (1902) I. L. R. 26 Mad. 157

CRIMINAL REVISION.

Before Mr. Justice Caspersz and Mr. Justice Ryves

BEHARI LAL CHATTERJEE

v.

EMPEROR.

RASH BEHARI SEN

v.

EMPEROR.*

1909
May 12.

Bail-bond, forfeiture of—Bond for appearance before the Sessions Court—Production of the accused before such Court but not before the District Magistrate—Sureties, liability of—Bail-bond, terms of—Criminal Procedure Code (Act V of 1898), s. 514.

A bail-bond providing only for the production of certain accused persons before the Sessions Court on a certain date is complied with by the appearance of the accused before such Court on such date, and the sureties are not bound to produce them subsequently before the District Magistrate.

A bail-bond to produce the accused in the Sessions Court on every date fixed for the hearing of an appeal, or whenever required, is also complied with by the attendance of the accused during the hearing; and, though a requisition might be made by the Court of Session for their subsequent production in that Court, the sureties are not bound to produce them thereafter before the District Magistrate.

A bail-bond should contain a clear proviso for the production of the accused before the Court or officer who is to take measures to secure their surrender and to re-commit them to jail in terms of the warrant.

General Rules and Circular Orders (Criminal) of the High Court, Chap. I, Rule 119, referred to.

THESE were two analogous Rules on behalf of the petitioners, who are muktears practising in the Criminal Courts at Khulna, to set aside two orders of the District Magistrate of Khulna, dated the 5th March 1909, directing forfeiture of ten *per cent.* of the amount of the bail-bonds entered into by them for the appearance of 28 appellants in the case of *Emperor v. Foyzuddi Sheikh and Others* whose appeals were

* Criminal Revision Nos. 339 and 340 of 1909, against the orders of J. Johnston, Officiating District Magistrate of Khulna, dated March 5, 1909.

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admitted by the Sessions Judge of Khulna, and who were ordered to be released on bail of Rs. 200 each.

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In Criminal Revision No. 339, two of the appellants, Nibaran and Punchanun, entered into a recognizance bond in Rs. 200 "to attend the Court of Session on the 1st December 1908, and, in default, to forfeit the amounts of the security bond." The petitioners, Behari Lal Chatterjee and Uzir Ali Sheikh, stood sureties in a joint bond "for the production of the above-named persons in the Sessions Court, on 1st December 1908, in the sum of Rs. 200 each," and, in default, they bound themselves "to forfeit the amount of security to the King-Emperor." Two other appellants and the same petitioners also executed a recognizance and bail-bond, respectively, in similar terms.

In Criminal Revision No. 340, Foyzuddi and 23 other appellants bound themselves "to attend the Sessions Court on 1st December 1908, or whenever required, and on every fixed date, and, in the case of making default, to forfeit to His Majesty the sum of Rs. 200 each." The petitioners, Rash Behari Sen and other muktears, by their joint bond, undertook "to produce them in the above-mentioned Court on every date that may be fixed for hearing, or whenever required, and, in case of default, to forfeit to His Majesty the sum of Rs. 200 in the case of each."

It appeared that the appellants were present in the Sessions Court on the 1st December 1908 and during the hearing of the appeals on the 10th instant. The appeals were dismissed on the 21st instant, and, on the 2nd January 1909, the District Magistrate passed an order in the following terms:—"Ask sureties, Uzir Ali Sheikh and Behari Lal Chatterjee, to produce the appellants before this Court within 14 days." A similar order was made on the same date in the case of Rash Behari Sen and the other signatories to their bond. The orders were communicated to the petitioners on the 7th January, but were not complied with. On the 3rd February the District Magistrate called upon them to show cause, within two days, why they should not forfeit the

amounts of the bail-bonds. The petitioners showed cause in writing on the 5th, and produced the accused before the jail authorities. The District Magistrate, not being satisfied with the cause shown, by two orders of the same date, directed the two sets of petitioners to forfeit ten *per cent.* of the total amount of the bonds. No requisition was ever made by the Sessions Judge for the production of the accused before him at any time after the disposal of the appeal.

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Babu Atulya Churn Bose, for the petitioners. The bonds were for the appearance of the appellants before the Sessions Court, and the petitioners complied with the terms thereof by bringing them before that Court during the appeal. They were not asked by the Judge to produce the accused after the dismissal of the appeals, and the District Magistrate had no power to call upon the petitioners to enforce their attendance before his own Court.

CASPERSZ AND RYVES JJ. [*Criminal Revision No. 339 of 1909.*] This is a Rule upon the District Magistrate to show cause why his order, dated the 5th March 1909, directing forfeiture of ten *per cent.* of the amount of each bail-bond, executed by the petitioners on behalf of certain accused persons, should not be set aside.

We do not propose to enter into all the facts of this case, because, in our opinion, the petitioners are not liable for the forfeiture of their bonds, in accordance with the conditions mentioned therein. Now, the terms of each bail-bond are these :—

“We hereby stand surety for the production of the above-named persons in the Sessions Court, on the 1st December next, in the sum of Rs. 200 each, and that, in the case of default, we shall forfeit the amount of the surety to the King-Emperor.”

The accused did appear in the Court of Session on the 1st December 1908, and, consequently, the condition of the bond was satisfied. The subsequent proceedings, at the instance

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of the District Magistrate, were, therefore, not warranted by the terms of the bond. The Rule is made absolute, and the order complained of is set aside.

[*Criminal Revision No. 340 of 1909.*] The circumstances in which this Rule was issued resemble those in Rule No. 339 of 1909 which we have just disposed of. Here, however, the bail-bond is drawn up somewhat differently, namely, as follows :—

“ We hereby stand surety under the above conditions for the aforesaid accused persons, convicted under the above sections, and undertake to produce them in the above-mentioned Court on every date that may be fixed for hearing, or whenever required, and, in case of default, we bind ourselves to forfeit to His Majesty the King-Emperor of India the sum of Rs. 200 in the case of each.”

The language contemplates the production of the accused persons in the Court of Session, and the order of the District Magistrate, dated the 5th March 1909, has no reference to the failure to produce the accused persons in that Court, but rather to some subsequent failure with which the petitioners were not legally concerned. The interpretation of the words “ whenever required ” in the bail-bond means, in our opinion, that a requisition might be made by the Court of Session for the production of the accused in that Court. The Rule is made absolute. The order complained of is set aside.

We desire to add that the bail-bonds referred to in these two Rules were not accurately drawn up, and did not properly provide for the production of the accused persons after their appeals had been disposed of by the Sessions Judge. Such a bond should contain a clear proviso for the production of the accused persons before the Court or officer who is to take measures to secure the surrender of the accused and to re-commit them to jail in terms of the warrant: see General Rules and Circular Orders (Criminal), Chapter I, Rule No. 119, page 45.

Rule absolute

APPELLATE CIVIL.

Before Mr. Justice Stephen and Mr. Justice Vincent.

SRIMOHAN JHA

v.

BRIJBEHARY MISSER.*

1909
May 14.

Hindu Law—Alienation—Legal Necessity—Hindu Daughter's right to alienate property—Onus of Proof—Sradh Ceremony—Government Revenue—Succession Certificate, Costs of—Property sold for Arrears of Road-cess, recovery of.

A Hindu widow died leaving her surviving a daughter as life-tenant to the estate of her deceased husband which was in involved circumstances. The daughter executed a *kobala* and a mortgage of the properties, and out of the moneys thereby obtained she paid for the *sradh* ceremony of her mother, the Government revenue, the costs of a succession certificate and a rent decree. She also executed another mortgage and used the money obtained to recover the property sold for arrears of road-cess. In a suit brought by the reversionary heir after the death of the life tenant to set aside the *kobala* and the mortgages as having been made by the life-tenant in excess of her power of alienation :—

Held, that it was for the defendant to show that these alienations had been made for legal necessity.

Held, further, that the expenses of the *sradh* ceremony, the payment of the Government revenue, the costs of the succession certificate and the payment of the rent decree were made for legal necessity ; but that the payment of money to recover the property sold for arrears of road-cess was not so made.

Raj Chandra Deb Biswas v. Sheeshoo Ram Deb (1), *Shekaat Hosain v. Sasi Kar* (2), *Mahanund Chuckerbutty v. Banimadhub Chatterjee* (3), *Rupram Namasudra v. Iswar Namasudra* (4) approved.

Braja Lal Sen v. Jiban Krishna Roy (5) distinguished.

SECOND APPEAL by Sri Mohan Jha, the plaintiff.

This appeal arises out of a suit brought by the plaintiff as reversionary heir seeking to have the alienations, made by the previous life-tenant, set aside and to recover possession of

* Appeal from Appellate Decree, No. 1433 of 1907, against the decree of H. E. Ransom, District Judge of Darbhanga, dated April 15, 1907, confirming the decree of Ambica Charan Dutt, Additional Subordinate Judge of Darbhanga, dated Jan. 31, 1907. -

(1) (1867) 7 W. R. 146.

(3) (1896) I. L. R. 24 Calc. 27.

(2) (1892) I. L. R. 19 Calc. 783.

(4) (1902) 6 C. W. N. 302.

(5) (1898) I. L. R. 26 Calc. 285.

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properties and surplus sale-proceeds on establishment of title on a declaration that the transferee has acquired no right by the alienations. The facts are briefly as follows :—

A Hindu widow died leaving her surviving a daughter as life-tenant to the estate of her deceased husband, one Harnandan Jha. In consequence of the involved circumstances of the estate of her father, the daughter executed a *kobala* and sold a portion of it in order to raise money to enable her to pay the expenses of her mother's *sradh*, the Government revenue and the costs of taking out a succession certificate of her father's property, and mortgaged the rest of the properties by two usufructuary bonds in order to enable her to meet the expenses of opposing an execution case and of recovering certain property which had been sold for arrears of road-cess. After the execution of the above-mentioned *kobala* and mortgages, the daughter died and the plaintiff as the next reversionary heir became entitled to the estate of Harnandan Jha. The plaintiff, thereupon, instituted the suit to set aside the alienations and to recover possession of the properties. Both the original Court and the lower Appellate Court dismissed the suit, and the plaintiff now appealed to the High Court.

Babu Golap Chandra Sircar (Babu Buldeo Narain Singh with him), for the appellant. The amounts of Government dues, the costs of succession certificate of the father's property and the payment of the rent decrees and of the amount for recovery of certain property sold in execution of road-cess are all personal debts and the estate cannot be charged with them. As regards the *sradh* expenses which amounted to Rs. 1,700, the judgment in *Raj Chunder Deb Biswas v. Sheeshoo Ram Deb* (1), which is at variance with the head note, makes these expenses a legal necessity. My contention is not whether these expenses are a valid charge, but whether the daughter was justified in incurring them when the estate was so heavily involved.

In order to make this estate liable for arrears of rent due after the death of the father, it must be shown that the debts were contracted as of necessity or under such circumstances

as to make the whole estate liable and not merely the interest in it of the person who contracted them. The moneys could have been borrowed and afterwards paid up out of the income: *Mohima Chunder Roy Chowdhry v. Ram Kishore Acharjee Chowdhry* (1) and *Braja Lal Sen v. Jiban Krishna Roy* (2).

The amount due on account of cesses is only a personal debt: *Shekaat Hosain v. Sasi Kar* (3), *Mahanund Chuckerbutty v. Banimadhub Chatterjee* (4), *Mahomed Abdul Hai v. Gujraj Sahai* (5), *Rupram Namasudra v. Iswar Namasudra* (6), and *Lachmi Narain Singh v. Nand Kishore Lal* (7).

The *kobala* and the mortgage bonds are not binding on the reversioner's interest in the immoveable property and the sale and conveyance which they purported to effect are in consequence invalid: *Giribala Dassi v. Srinath Chandra Singh* (8). Finally, the reversioner has not to prove legal necessity. The whole onus is on the other party.

Babu Shorashi Charan Mitra, for the respondent. In considering the question of the money spent for the various dues and expenses, the pressure on the estate and the fact that payments were made *bonâ fide* must be taken into consideration. There were debts to be paid and the estate was very much involved and payments were made in the *bonâ fide* belief that they were rightly made. It was only the right, title and interest of the daughter that were alienated, and it was done to meet the expenses which, as she was satisfied, were for legal necessity. If there be moneys in hand from the income, the sums borrowed shall be paid back.

STEPHEN AND VINCENT JJ. The suit out of which this appeal arises is brought in order that a *kobala* executed on the 29th December 1877 and the usufructuary mortgage-bonds, dated the 23rd June 1891 and 8th August 1891, may be declared null and void on the death of one Musammat Bisneshuri Dai. She was the tenant for life of the estate of her father

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(1) (1875) 23 W. R. 174.

(2) (1898) I. L. R. 26 Calc. 285.

(3) (1892) I. L. R. 19 Calc. 783.

(4) (1896) I. L. R. 24 Calc. 27

(5) (1893) I. L. R. 20 Calc. 826.

(6) (1902) 6 C. W. N. 302.

(7) (1902) I. L. R. 29 Calc. 537.

(8) (1906) 12 C. W. N. 769

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who was the last full owner. The plaintiff is his reversionary heir, and he now sues to have the sales set aside as having been made by the lady in excess of her powers of alienation. It is for the defendant to show that these sales were made for legal necessity.

As regards the *kobala* of the 29th December 1887, it was executed in the first place for the purpose of securing money for performing the *sradh* ceremony of the mother of the tenant for life. It is admitted by the plaintiff that the lower Appellate Court is right in the view it takes of the decision in the case of *Raj Chandra Deb Biswas v. Sheeshoo Ram Deb* (1), and that the performance of the *sradh* ceremony of the mother is a legal necessity for which the tenant for life was justified in charging the family property. A point has been raised before us that the amount in *sradh*, viz., the sum of Rs. 1,700, is excessive. But this is a question which we cannot go into. Out of the balance of the money secured by the execution of the above-mentioned *kobala*, Rs. 300 was spent in paying the Government revenue. We have no doubt at all that this also must be regarded as a legal necessity. It is admitted on both sides that the estate was exceedingly involved at the time, and there can be no doubt also that the life-tenant was acting judiciously in raising funds for the purpose of paying the Government revenue. We are, therefore, of opinion that it should be regarded as a legal necessity. Similarly the sum of Rs. 85 which was raised in order to pay the costs of a succession certificate was spent for a legal necessity, as the succession certificate was a document, without which it would have been impossible for the life-tenant to manage the estate.

Then come the two mortgage bonds. The deed of the 23rd June 1891 was executed in order to raise the sum of Rs. 80 for paying a rent decree. It is argued before us that this was a personal obligation only, and in support of this contention reference is made to the decision in the case of *Braja Lal Sen v. Jiban Krishna Roy* (2). That, however, is a

(1) (1867) 7 W. R. 146.

(2) (1898) I. L. R. 26 Calc. 285.

very different case from the present one, as in that case certain co-sharers were suing the tenant for life, and it would not be in their power to affect the interest of the reversioner. In this case had the rent decree not been paid, the whole estate could have been placed in peril, and it was the duty of the life-tenant, as a careful manager of the estate, to pay the rent decree. Under these circumstances, we agree with the lower Appellate Court in holding that this was also a matter of legal necessity.

As regards the third document of the 8th August 1891, it was a mortgage executed for Rs. 500. This money was used to recover the property which had been sold for arrears of road-cess apparently under the Public Demands Recovery Act. Authorities have been produced before us to show that the obligation to pay such a debt as this was a personal one, and decisions in the cases of *Shekaat Hosain v. Sasi Kar* (1), *Mahanund Chuckerbutty v. Banimadhub Chatterjee* (2) and *Rupram Namasudra v. Iswar Namasudra* (3) seem to show that the point is one beyond dispute. It is argued before us by the learned pleader for the respondent that under the circumstances of the case, considering the pressure under which the estate was and considering the benefit which accrued to the reversioner, it ought to be considered as a legal necessity. In view of the fact that this money was not used to stop the execution of a decree under the Public Demands Recovery Act, we find it impossible to hold that this money was spent to meet a legal necessity. So far as the money is concerned we think that the appellant must succeed.

The result is that this appeal must be allowed and the decree of the lower Appellate Court set aside so far as this bond of the 8th August 1891 for the sum of Rs. 500 is concerned. In other respects the decree of the lower Appellate Court will stand. The parties will be entitled to proportionate costs throughout.

O. M.

Appeal allowed in part.

(1) (1892) I. L. R. 19 Calc. 783.

(2) (1896) I. L. R. 24 Calc. 27.

(3) (1902) 4 C. W. N. 302.

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CRIMINAL REVISION.

Before Mr. Justice Caspersz and Mr. Justice Ryves.

1909
May 20.

DURGA TEWARI AND OTHERS

v.

EMPEROR.*

Theft—Criminal Breach of Trust—Moveable or immoveable Property—Entrustment of Land with standing Crops—Cutting and disposing of Crops—Penal Code (Act XLV of 1860), ss. 379, 405.

Where certain land, on which there was a standing crop of paddy, was entrusted to the accused to take care of and watch till the paddy was ripe when they were to give notice to the factory people who would reap it:—

Held, that by cutting the crops themselves and disposing of the same, the accused were guilty of theft if not of criminal breach of trust.

Jugdown Sinha v. Queen-Empress (1) and *Reg. v. Girdhar Dharamdas* (2) distinguished.

Queen-Empress v. Bhagu (3) followed.

ONE Sunder Lal, the munshi of the Materia factory, cultivated some 18 bighas of land in village Kuari, but surrendered them with the standing crops to the factory in July 1908. In September the manager of the factory placed the lands on which the crops were growing in charge of a *punchayet*, consisting of the accused, under a *parwana* with directions to look after the lands and to report, when the paddy was ripe for cutting, to the factory people who would reap the crops. The lower Courts found that the accused, as members of the *punchayet*, were entrusted with both the lands and the crops, and that they cut and removed the paddy to their granaries and disposed of the same afterwards. The accused were tried and convicted by the Subdivisional Officer of Bettiah, on the 17th January 1909, under section 406 of the Indian Penal Code and sentenced the petitioner, Durga

* Criminal Revision No. 436 of 1909, against the order of D. H. Kingsford, Sessions Judge of Tirhoot, dated March 16, 1909.

(1) (1895) I. L. R. 23 Calc. 372.

(2) (1869) 6 Bom. H. C. 33.

(3) (1897) Ratanlal, Unrep. Cr. C. 928.

Tewari, to six months' rigorous imprisonment and a fine of Rs. 1,000, and the petitioners, Ram Sah and Jugdis Narain, to four months' rigorous imprisonment and a fine of Rs. 500 each. An appeal against the order of the Magistrate was dismissed by the Sessions Judge of Tirhoot on the 16th March. The petitioners then moved the High Court and obtained this Rule to set aside the conviction and sentences on the ground that the property contemplated in section 406 of the Penal Code is moveable property, whereas the property entrusted to the petitioners was standing crops.

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Babu Atul Krishna Roy, for the petitioners. The accused were entrusted with the lands and the crops growing on them. Standing crops are immoveable property: *Queen-Empress v. Obayya* (1), and criminal breach of trust cannot be committed in respect of immoveables: *Jugdown Sinha v. Queen-Empress* (2), *Reg. v. Girdhar Dharamdas* (3) and *Queen-Empress v. Bhagu* (4). The fines ought to be directed to be paid to the complainant under section 545 of the Criminal Procedure Code, and not to Government.

CASPERSZ AND RYVES JJ. This is a Rule on the District Magistrate to show cause why the conviction and sentences of the petitioners should not be set aside on the ground that the property contemplated in section 406 is moveable property, and the property entrusted to the petitioners was standing crops; on the authority of the case of *Jugdown Sinha v. Queen-Empress* (2), and also why the sentences should not be reduced.

It has been found by both Courts that 18 bighas of land on which was then standing a crop of paddy were entrusted to the petitioners to take care of and watch until the paddy was ripe when they were to give notice to the factory people who would cut it. When the paddy was ripe the petitioners themselves cut the crops and disposed of the same. On these

(1) (1898) I. L. R. 22 Mad. 151.

(2) (1895) I. L. R. 23 Calc. 372.

(3) (1869) 6 Bom. H. C. 33.

(4) (1897) Ratanlal, Unrep. Cr.
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findings both the Courts concurred in convicting the petitioners under section 406 of the Indian Penal Code.

In this Court it has been contended that, inasmuch as the property was standing crops at the time when the trust was created, no offence under section 406 of the Indian Penal Code could have been committed in relation to that crop, and the case of *Jugdown Sinha v. Queen-Empress* (1) has been relied upon, as also the case of *Reg. v. Girdhar Dharamdas* (2). In the former case the subject of trust was land; in the latter case, a house. Reliance is also placed on the case of *Queen-Empress v. Bhagu* (3). The facts of this case are very similar to the case now before us. In that case a forest guard, who had been engaged to watch a Government forest, had been convicted of an attempt to commit criminal breach of trust, because he had allowed a timber merchant improperly to cut and remove some trees from the forest. It was held in revision in that case that it was "extremely doubtful if the forest guard could have been in any manner entrusted with the trees of the forest or with any dominion over those trees. He seems to have been merely a watchman employed to guard the trees and to prevent any injuries being done to the forest. The fact that he omitted to do his duty would hardly, we think, amount to criminal breach of trust." The learned Judges go on to say: "Moreover, the trees are immoveable properties, and according to good authority criminal breach of trust could not be committed in respect of them." Reference is then made to the cases we have already quoted. The learned Judges, therefore, held that section 406 was inapplicable to the facts of that case, and altered the conviction to one under section 379. In this case the property which was entrusted to the accused was a crop of paddy which the petitioners had to guard until it had become ripe. At that time, no doubt, it was immoveable property. When they cut the paddy it became moveable property, but it still remained entrusted to them. If they, therefore, improperly

(1) (1895) I. L. R. 23 Calc. 372.

(2) (1869) 6 Bom. H. C. 33.

(3) (1897) Ratanlal, Unrep. Cr. C. 928.

disposed of it, it seems to us that they committed criminal misappropriation within the meaning of section 405. If, on the other hand, the lower Courts are not right in holding, as we are inclined to think, that the crops were entrusted to the petitioners, within the meaning of section 405, then for the reasons given in the last quoted Bombay case their conviction under section 379 would not be improper. The property became capable of theft the moment it was severed from the ground: *vide* Explanation (2) to section 378 of the Penal Code. We have been asked to reduce the sentences. It seems, however, from the explanation of the Magistrate that a very considerable amount of paddy, probably of the value of Rs. 1,000, was removed. We, therefore, do not think that the terms of imprisonment are too severe.

With regard to the fines, we direct that if they, or any portion thereof, be realised, the amount will be awarded as compensation, under section 545 of the Criminal Procedure Code, to the manager of the factory.

The petitioners must now surrender to their bail and serve out the remaining portions of their sentences. The Rule is discharged.

Rule discharged

E. H. M.

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APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

1909

March 9.

MACKENZIE

v.

NARSINGH SAHAI.*

Partition—Appeal—Preliminary Decree—Final Decree—Appeal against preliminary decree after final decree, legality of—Civil Procedure Code (Act XIV of 1882) s. 562—Practice.

Where in a partition suit a final decree had been made and an appeal was preferred against the preliminary decree only :—

Held, that it was not open to the appellant to challenge the correctness of the preliminary decree without preferring an appeal against the final decree.

Madhu Sudan Sen v. Kamini Kanta Sen (1) referred to. *Baikunta Nath Dey v. Nawab Salimulla Bahadur* (2) followed.

Uman Kunwari v. Jarbandhan (3), *Sheo Nath Singh v. Ram Din Singh* (4) not followed.

APPEAL from a preliminary decree in a partition suit, by M. H. Mackenzie, executor to the estate of the late E. S. Llewellyn, the defendant first party.

The plaintiffs brought a suit for the partition and recovery of possession of zerait land and for mesne profits. The defendant first party contested the suit on various grounds amongst others that the partition of zerait land only is not maintainable unless the entire mahal was partitioned. That the plaintiffs are not entitled to mesne profits. The lower Court, on the authority of *Kamla Prosad Singh v. Bhagwati Charan* (5), held that the suit was maintainable, and passed a preliminary judgment and decree on the 11th and 16th of April 1907 respectively, and a final decree on the 10th of July 1907.

The present appeal against the preliminary decree of the Subordinate Judge was filed on the 19th of July 1907.

* Appeal from Original Decree, No. 295 of 1907, against the decree of Ambica Charan Dutt, Subordinate Judge of Darbhanga, dated April 11, 1909.

(1) (1905) I. L. R. 32 Calc. 1023.

(3) (1908) I. L. R. 30 All. 479.

(2) (1907) 6 C. L. J. 547.

(4) (1895) I. L. R. 18 All. 19.

(5) Unreported.

Babu Jogesh Chandra Roy (Babu Akshay Kumar Banerji with him), for the respondent, raised a preliminary objection that the right of appeal from an interlocutory order ceases with the disposal of the suit, hence, where there was no appeal against the final decree, there could be no appeal against the preliminary decree : *Barikunta Nath Dey v. Nawab Salimulla Bahadur* (1).

Babu Samatul Chandra Dutt, for the appellant. By analogy, the fact that a suit has been decided by a Court of first instance in compliance with an order of remand made under section 562 of the Code of Civil Procedure (Act XIV of 1882) is no bar to the filing of appeal from the order of remand or to the hearing of such an appeal : *Uman Kunwari v. Jarbandhan* (2). See also *Sheo Nath Singh v. Ram Din Singh* (3).

MOOKERJEE AND CARNDUFF JJ. This is an appeal on behalf of the first party defendant in a suit for partition of joint property, and is directed against the preliminary decree made on the 11th April 1907.

A preliminary objection is taken to the hearing of the appeal on the ground that before the appeal was presented to this Court the final decree in the suit had been made by the Subordinate Judge on the 10th July 1907, and that consequently it was not open to the appellant to challenge the correctness of the preliminary decree without preferring an appeal against the final decree. In our opinion this contention is well founded and the appeal is incompetent.

The principle applicable to cases of this description was laid down by this Court in *Madhu Sudan Sen v. Kamini Kanta Sen* (4) where it was ruled that the right of appeal from interlocutory orders ceases with the disposal of the suit. That principle, in our opinion, is equally applicable to cases of suits in which there is first a preliminary decree and, ultimately, a final decree. That this principle, which was followed in

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(2) (1908) I. L. R. 30 All. 479.

(3) (1895) I. L. R. 18 All. 19.

(4) (1905) I. L. R. 32 Calc. 1023.

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Baikunta Nath Dey v. Nawab Salimulla Bahadur (1), is applicable to the case before us, admits of no controversy, and follows obviously from the application of a simple test. If this appeal is heard on the merits and the preliminary judgment of the Subordinate Judge set aside, what would be the position of the parties? The final decree, which up to the present moment has not been questioned by way of appeal, would still stand, and that decree would entitle the plaintiff to eject the appellant. If the appeal is heard and decided in favour of the appellant, in order to give him any relief, the final decree against which no appeal has been preferred would have to be indirectly set aside. It is difficult to appreciate how such a state of things could possibly have been contemplated by the Legislature. Nor does any question of hardship arise, for, on the 19th July 1907, when the appeal now under consideration was presented to this Court, it was open to the appellant to prefer an appeal against the final decree which had been made nine days previously. It is needless for our present purposes to consider, under what circumstances no appeal was filed against the final decree. The fact remains that up to the present time the final decree has not been challenged. We must take it, therefore, that on the 10th July 1907, as soon as the final decree was made, the appellant lost his right to prefer an appeal to this Court against the preliminary decree of the 11th April 1907.

Our attention was invited to the decision of a Full Bench of the Allahabad High Court in *Uman Kunwari v. Jarbandhan* (2), in which it was ruled that the fact that a suit has been decided by the Court of first instance in compliance with an order of remand made under section 562 of the Code of Civil Procedure is no bar to the filing of an appeal from the order of remand or to the hearing of such an appeal. After consideration of this decision, we adhere to the view taken by this Court in the cases previously mentioned. We observe that one of the reasons given by the learned Judges of the Allahabad High Court is that if an appeal is not preferred against an order of remand,

(1) (1907) 6 C. L. J. 547

(2) (1908) I. L. R. 30 All. 479.

the party would be without remedy, because according to the practice of the Allahabad High Court, as indicated in *Sheo Nath Singh v. Ram Din Singh* (1), the party aggrieved by the order of remand would not be entitled in an appeal against the final decree to limit his grounds to the order of remand alone. No such rule, however, prevails in this Court; in our opinion, if the final decree has been made, it is not only open to but is the duty of the party who is aggrieved by the order of remand, which up to that stage has not been questioned by way of appeal, to prefer an appeal against the final decree and to question the validity of the interlocutory order.

The appeal, therefore, fails and must be dismissed with costs.

S. A. A. A.

Appeal dismissed.

(1) (1895) I. L. R. 18 All. 19.

CIVIL RULE.

Before Mr. Justice Doss and Mr. Justice Richardson.

BIPRA DAS DEY

v.

RAJARAM BANERJEE.*

Bengal Tenancy Act (VIII of 1885) s. 170—Decree for arrears of rent due on two holdings—Claim, whether maintainable—Civil Procedure Code (Act XIV of 1882) s. 278.

Section 170 of the Bengal Tenancy Act (VIII of 1885) does not apply to a decree obtained by a co-sharer landlord for his share of rent in respect of two holdings; and that, therefore, when the holdings are attached in execution of such a decree, a claim under section 278 of the Code of Civil Procedure is maintainable.

Hridaynath Das Chowdhry v. Krishna Prasad Sircar (1) and *Baikanta Nath Roy v. Thakur Debendro Nath Sahi* (2) referred to.

RULE granted to the petitioner, Bipra Das Dey.

The opposite party along with his other co-sharers brought a suit for recovery of arrears of rent in respect of two holdings.

* Civil Rule No. 498 of 1909, against the order of Charu Chandra Mitra, Munsif, 1st Court of Bankura, dated Jan. 25, 1909.

(1) (1907) I. L. R. 34 Calc. 298

(2) (1906) 11 C. W. N. 676.

11 C. W. N. 497.

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Subsequently the said co-sharers having refused to join as plaintiffs were transferred to the category of *pro formâ* defendants. A decree was passed in favour of the opposite party for a share of rent due to them alone. In execution of that decree the holdings were attached. Thereupon, the petitioner preferred a claim under section 278 of the Code of Civil Procedure in the Court of the Munsif of Bankura. The learned Munsif having held that the claim was barred under section 170 of the Bengal Tenancy Act, rejected the claim preferred by the petitioner by an order dated the 25th January 1909. Against this order the petitioner moved the High Court and obtained the Rule.

Babu Sarat Chandra Bysack (for *Babu Digambar Chatterjee*), for the petitioner. Chapter XIV of the Bengal Tenancy Act applies only in cases in which a holding is attached and put up to sale for its own arrears and not for any other claim. Section 170, being one of the sections in Chapter XIV, cannot apply to cases where a holding is attached not only for its own arrears but also for other claims: *Hridaynath Das Chowdhry v. Krishna Prasad Sircar* (1) and *Baikanta Nath Roy v. Thakur Debendrao Nath Sahi* (2). The language of section 170, which prohibits the application of section 278, Civil Procedure Code, to the case of a holding attached in execution of a decree for arrears thereon, also shows that it can have no application in the present case, as neither of the two holdings can be said to have been attached in execution of a decree for its own arrears only; each holding was attached in execution of a decree not only for its own arrears but also for arrears due for the other.

Babu Nalini Ranjan Chatterjee, for the opposite party. The cases cited by the other side do not apply to the facts of the present case. There has been no sale yet nor any proceedings taken for sale of the two holdings. They have been merely attached. The cases of *Hridaynath Das Chowdhry*

(1) (1907) I. L. R. 34 Cal. 298;
11 C. W. N. 497.

(2) (1906) 11 C. W. N. 676.

v. *Krishna Prasad Sircar* (1) and *Nanda Lal Mukherji v. Sadhu Charan Khan* (2) go to show that a decree for rent obtained in respect of several holdings is a valid decree under the Bengal Tenancy Act. Section 170 of the Act bars a claim to the holdings attached under such a decree. The question whether the two holdings can be sold under such a decree under the special procedure laid down in the Bengal Tenancy Act, does not arise at this stage.

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Doss J. This is a Rule calling upon the opposite party to show cause why the order of the Munsif of Bankura, dated the 25th January 1909, should not be set aside.

It appears that the opposite party who were the plaintiffs in the Court below brought a suit along with the *pro formâ* defendants, who were their co-sharers, for arrears of rent due on two holdings. These *pro formâ* defendants upon their refusing to join the other plaintiffs in the suit were subsequently transposed to the category of defendants. The decree which the plaintiff obtained was one for a share of the rent due to them alone. In the execution of that decree, the two holdings were attached. Thereupon, the petitioner preferred a claim under section 278 of the Civil Procedure Code. The opposite party objected that the claim was barred under section 170 of the Bengal Tenancy Act. The Court below has given effect to that objection.

I am of opinion that the order of the Munsif cannot be sustained.

Section 170 is one of the sections in Chapter XIV of the Bengal Tenancy Act, and it cannot, therefore, apply to any case in which the decree is not of such a nature as is contemplated in that Chapter. The decree in this case, as I have already said, was for arrears of rent due in respect of two holdings. Therefore, when either of the two holdings was attached, it was attached in execution of a decree passed not only for arrears due on one of the two holdings but also for

(1) (1907) I. L. R. 34 Cal. 298 ;
11 C. W. N. 497.

(2) (1907) 7 C. L. J. 96.

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arrears due on the other holding. It follows that section 170 of the Bengal Tenancy Act cannot apply to this case.

This view gains support from the *ratio decidendi* of the judgments in the case of *Hridaynath Das Chowdhry v. Krishna Prasad Sircar* (1) and in that of *Baikanta Nath Roy v. Thakur Debendra Nath Sahi* (2).

The order of the Court below is, therefore, set aside and this Rule is made absolute with costs.

RICHARDSON J. I agree.

s. c. c.

Rule absolute.

(1) (1907) I. L. R. 34 Calc. 298; (2) (1906) 11 C. W. N. 678.
11 C. W. N. 497.

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

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JAGON RAM MARWARI

MAHADEO PROSAD SAHU.*

Minor—Contract with Minor—Benefit of Minor—What are ‘Necessaries’—Wedding Presents—Guardian, Discharge or Death of—Majority Act (IX of 1875) s. 3.—Guardians and Wards Act (VIII of 1890) s. 52.

Where a guardian has once been validly appointed or declared, the minority does not cease till the attainment of 21 years by the ward, and it is immaterial whether the guardian dies or is removed, or otherwise ceases to act.

Rudra Prokash Misser v. Bhola Nath Mukherjee (1), *Khwahish Ali v. Surju Prasad Singh* (2), *Gordhandas v. Harivalubdas* (3) and *Gopal Chunder Bose v. Gonesh Chunder Sremani* (4) referred to.

Patesri v. Champa Lal (5) dissented from.

* Appeal from Appellate Decree, No. 1334 of 1907, from a decree of R. L. Ross, District Judge of Mozaffarpur, dated March 27, 1907, affirming the decree of Purna Chandra Chowdhuri, Subordinate Judge of Mozaffarpur, dated Dec. 22, 1906.

(1) (1886) I. L. R. 12 Calc. 612.

(3) (1896) I. L. R. 21 Bom. 231.

(2) (1881) I. L. R. 3 All. 598.

(4) (1905) 4 C. L. J. 112.

(5) (1891) 11 All. W. N. 118.

Birj Mohun Lal v. Rudra Perakash Misser (1) explained.

Shivram v. Krishnabai (2), *Yeknath v. Warubai* (3) and *Mungniram Marwari v. Gursahai Nand* (4) referred to.

Nagardas Vachraj v. Anandrao Bhai (5) distinguished.

If an order of Court, which has been erroneously made or irregularly obtained, is subsequently revoked, the position of the party is the same as if the order had never been made.

In re Newman (6) followed.

'Necessaries' include articles fit to maintain the particular person in the state, degree and station in life in which he is.

Peters v. Fleming (7) followed.

Ryder v. Woombwell (8) and *Walter v. Everard* (9) referred to.

'Necessaries' must be determined with reference to the fortune and circumstances of the particular infant. Wedding presents for the bride may be 'necessaries.'

Jenner v. Walker (10), *Juggessur Sircar v. Nilumbur Biswas* (11) and *Makundi v. Sarabsukh* (12) referred to.

Though a particular article furnished may correspond in quality and price with the infant's means, yet if it should turn out that the infant was already plentifully supplied with the thing purchased, it does not fall within the description of 'necessaries' in that particular case.

Johnstone v. Marks (13) followed.

Infant can always show that he was already plentifully supplied with similar goods, and it is immaterial whether the seller knew it or not.

Barnes v. Toye (14) and *Ford v. Fothergill* (15) followed.

It is incumbent upon one who sells goods to an infant to enquire into his circumstances so as to determine not only whether the thing sold is such an article as an infant of the station in life of the purchaser would require, but whether in the particular case the purchaser had need for it, for if the infant did not require it, the seller cannot recover it.

Johnson v. Lynes (16) relied on.

The question as to what are 'necessaries' is a mixed question of fact and law.

Peters v. Fleming (7), *Maddox v. Miller* (17) and *Wharton v. Mackenzie* (18) referred to.

(1) (1889) I. L. R. 17 Calc. 944.

(2) (1906) I. L. R. 31 Bom. 80.

(3) (1888) I. L. R. 13 Bom. 285.

(4) (1889) I. L. R. 17 Calc. 347.

(5) (1907) I. L. R. 31 Bom. 590.

(6) [1899] 2 Q. B. 587.

(7) (1840) 6 M. & W. 42;

55 R. R. 495.

(8) (1868) L. R. 3 Exch. 90;

4 Exch. 32.

(9) [1891] 2 Q. B. 369.

(10) (1868) 19 L. J. N. S. 398.

(11) (1865) 3 W. R. 217.

(12) (1884) I. L. R. 6 All. 417.

(13) (1887) 19 Q. B. D. 509.

(14) (1884) 13 Q. B. D. 410.

(15) (1794) 1 Peake 301; 3 R. R. 695.

(16) (1843) 6 Watts & Sergeant 80.

(17) (1813) 1 M. & S. 738;

14 R. R. 565.

(18) (1844) 5 Q. B. 606; 64 R. R. 584.

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The mere fact that an infant has a father, mother or guardian, does not prevent his being bound to pay for what was actually necessary for him when furnished, if neither his parents nor guardian did anything towards his care or support. The test is whether the articles supplied were needed for the use of the infant.

Call v. Ward (1) followed.

SECOND APPEAL by the plaintiffs, Jagon Ram Marwari and Jorawa Mull.

The plaintiffs who are dealers in cloth, cash, gold, silver, pearls, etc., at Mozaffarpur, brought a suit against the defendant who is a zemindar of position and considerable income at the same place, for the value of goods supplied to the defendant between the 14th January 1902 to the 18th October 1904.

The defendant filed his written statement through his certificated guardian, Chhatradhari Sahu, and resisted the suit on various grounds, amongst others, that the claim was fictitious, that the defendant was a minor at the time the contract was entered into and as such was not liable under the contract, and that it was not for his benefit.

The Courts below concurrently found upon the evidence adduced in the case, that the purchases were made from the plaintiffs for the benefit of the defendant, but they held, that the articles supplied could not be regarded as 'necessaries' for the minor and, therefore, dismissed the plaintiffs' case. Hence this appeal.

Babu Provash Chandra Mitter (Dr. Rashbehary Ghose with him), for the appellants. The defendant was not an infant at the time of the contract, inasmuch as the first certificated guardian had been discharged: *Patesri v. Champa Lal* (2), *Yeknath v. Warubai* (3) and *Birj Mohun Lal v. Rudra Perakash Misser* (4). Even if the defendant was a minor the goods supplied were 'necessaries,' and the plaintiffs are entitled to the amount claimed. Sections 11 and 168 of the Contract Act (Act IX of 1872) referred to.

(1) (1842) 4 Watts & Sergeant 119.

(2) (1891) 11 All. W. N. 118.

(3) (1888) I. L. R. 13 Bom. 285.

(4) (1889) I. L. R. 17 Calc. 944.

Babu Shorashi Charan Mitra, for the respondent. If a guardian is once appointed or declared by a competent Court, the disability of the minor continues until the attainment of 21 years of age, even though the guardian may die, be removed or otherwise cease to act: *Rudra Prokash Misser v. Bhola Nath Mukherjee* (1), *Khwahish Ali v. Surju Prasad Singh* (2) and *Gordhandas v. Harivalubhdas* (3).

Cur. adv. vult.

MOOKERJEE AND CARNDUFF JJ. The plaintiffs, appellants, are tradesmen in the town of Mozaffarpur and are dealers in cloth, gold, pearls, jewellery and other articles. The defendant is a zemindar resident in the same place and is admittedly a person of position and considerable income. The plaintiffs commenced this action for recovery of approximately Rs. 2,300 from the defendant, for goods supplied during a period of more than two years from the 14th January 1902 to 18th October 1904. The defendant, who at the time of the institution of the suit was an infant under the guardianship of a certificated guardian, resisted the claim substantially on two grounds, namely, *first*, that the transactions mentioned in the plaint were entirely fictitious, and, *secondly*, that as at the dates of the alleged transactions, he was an infant, he was not liable to pay for the goods. The Courts below have found concurrently upon the first question in favour of the plaintiffs, and have held upon the evidence that the purchases were made from them for the benefit of the defendant. Upon the second question, they have held that the articles supplied could not be regarded as necessary expenses, and therefore the plaintiffs were not entitled to their value. The plaintiffs have now appealed to this Court, and on their behalf the decision of the District Judge has been assailed substantially on two grounds, namely, *first*, that at the time of the transactions the defendant was not an infant, inasmuch as the first certificated guardian had been discharged, and, *secondly*, that even if he be regarded in the eye of law as an infant, the

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(2) (1881) I. L. R. 3 All 598.

(3) (1896) I. L. R. 21 Bom. 281.

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articles supplied were necessities for which the plaintiffs were entitled to be paid.

In support of the first ground urged on behalf of the appellants, it has been pointed out that the defendant was born on the 8th November 1885, that one Bisun Deo was appointed his guardian under the Guardians and Wards Act of 1890 on the 20th November 1901, that on the 28th April 1903 Bisun Deo, upon his own application and with the assent of the present defendant, was discharged from the guardianship, and that it was not till the 8th September 1905 that Chhatradhari, the present guardian, was appointed by the District Judge under Act VIII of 1890. On these facts, which are not disputed, it has been contended on behalf of the appellants that the defendant attained his majority on the 8th November 1903 and not on the 8th November 1906, and that consequently the appointment of the second guardian on the 8th September 1905 was *ultra vires*. In support of this position, reliance has been placed upon the cases of *Patesri v. Champa Lal* (1), *Yeknath v. Warubai* (2) and *Birj Mohan v. Rudra Perakash* (3). On behalf of the respondent, it has been argued on the other hand that if a guardian be once appointed or declared, the disability of the minor continues until the attainment of 21 years of age, although the guardian may die, be removed or otherwise cease to act, and in support of this proposition reliance has been placed upon the cases *Rudra Prokash v. Bhola Nath* (4), *Khwahish v. Surju Prasad* (5) and *Gordhandas v. Harivalubhdas* (6). In our opinion the contention of the appellants is clearly opposed to the plain language of section 3 of the Indian Majority Act of 1875, as amended by section 52 of the Guardians and Wards Act of 1890. Section 3 provides that every minor of whose person or property or both, a guardian other than a guardian for a suit has been or shall be appointed or declared by any Court of Justice before the minor has attained the age of

(1) (1891) 11 All. W. N. 118.

(2) (1888) I. L. R. 13 Bom. 285.

(3) (1889) I. L. R. 17 Calc. 944.

(4) (1886) I. L. R. 12 Calc. 612.

(5) (1881) I. L. R. 3 All. 598.

(6) (1896) I. L. R. 21 Bom. 281.

18 years, and every minor of whose property the superintendence has been or shall be assumed by any Court of Wards before the minor has attained that age, shall be deemed to have attained his majority when he shall have completed his age of 21 years and not before. The language of this section fully supports the view taken in the cases of *Rudra Prokash v. Bhola Nath* (1), *Khwahish v. Surju Prasad* (2) and *Gordhandas v. Harivalubhdas* (3), which is also supported by the recent decision of this Court in *Gopal Chunder v. Gonesh Chunder* (4). We are not prepared to adopt the view indicated in the judgment of Sir John Edge in *Patesri v. Champa Lal* (5), in which that learned Judge dissented from the decision of this Court in *Rudra Prokash v. Bhola Nath* (1). We observe that reliance was placed by Sir John Edge upon the case of *Birj Mohan v. Rudra Perkash* (6) with reference to which it is sufficient to state that the language of section 3 has been altered since that decision was given, and the words "Every minor under the jurisdiction of any Court of Wards" have been replaced by the words "Every minor of whose property the superintendence has been or shall be assumed by any Court of Wards." The view, therefore, that the disability of the minor only continues so long as the Court of Wards retains the charge of his property, can no longer be maintained. We also observe with reference to the case of *Patesri v. Champa Lal* (5) that it was dissented from by the learned Judges of the Bombay High Court in *Gordhandas v. Harivalubhdass* (3). It is further worthy of note that as pointed out in *Shivram v. Krishnabai* (7) the earlier decision in *Yeknath v. Warubai* (8) has been superseded by the decision of their Lordships of the Judicial Committee in *Mungniram v. Mohunt Gursahai* (9). As regards the decision in the case of *Nagardas Vachraj v. Anandrao Bhai* (10), it is clearly distinguishable. It was ruled in that

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(2) (1881) I. L. R. 3 All. 598.

(7) (1906) I. L. R. 31 Bom. 80.

(3) (1896) I. L. R. 21 Bom. 281.

(8) (1888) I. L. R. 13 Bom. 285.

(4) (1905) 4 C. L. J. 112.

(9) (1889) I. L. R. 17 Calc. 347 ;

(5) (1891) 11 All. W. N. 118.

L. R. 16 I. A. 195.

(10) (1907) I. L. R. 31 Bom. 590.

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case that if an order made under the Guardians and Wards Act for the appointment of a guardian is subsequently set aside, the period of minority is not extended to 21 years under section 3 of the Indian Majority Act. This decision is based on the perfectly intelligible principle that if an order of Court which has been erroneously made or irregularly obtained, is subsequently revoked, the position is the same as if the order had never been made, or to use the words of Mr. Justice Wright in *In re Newman* (1), the invalid order is rescinded *ab initio* and is treated as though never made, so that the party is restored to his original position. This principle has obviously no application to a case in which the guardian either dies, or is removed, or as in the case before us, voluntarily obtains his discharge. Upon a review then of the authorities, and upon an examination of the language of section 3 of the Indian Majority Act, as amended by section 52 of the Guardians and Wards Act of 1890, we feel no doubt that if a guardian has once been validly appointed or declared, the minority does not cease till the attainment of 21 years of age by the ward, and it is immaterial, whether the guardian dies or is removed, or otherwise ceases to act. The first ground taken on behalf of the appellants cannot, therefore, be supported and must be overruled.

The second ground urged on behalf of the appellant is substantially to the effect that the case has not been properly tried on the merits, that the Courts below have proceeded on the assumption that the defendant is not liable for any articles which are not proved to be necessary to the support of life, and that the accounts show on the face of them that various articles of ordinary use were supplied, as also other articles required by a minor of the position in life of the defendant on the occasion of his marriage which took place in April or May 1903. We have carefully examined the judgment of the Subordinate Judge as also that of the District Judge, and are of opinion that the contention of the appellants is well founded. The Subordinate Judge stated the question to be, whether the articles supplied could be treated as

(1) [1899] 2 Q. B. 587.

necessary expenses, and held that as most of the purchases were made at or about the time of the marriage of the defendant, and as there was no reliable evidence to show that the things were required for the marriage, the plaintiffs were not entitled to recover. The District Judge proceeded on a somewhat different ground. He held that as many of the articles were supplied shortly after the marriage they could not be treated as necessities for the marriage; and further, that as the arrangements for the marriage were in the hands of a person named Gajadhar with whom the plaintiffs had no dealings, they were not entitled to recover the price of the articles supplied. It is obvious that there has not been a proper trial of the question in controversy between the parties in either of the Courts below. As we have already stated, the alleged transactions extend over a period of nearly three years from January 1902 to October 1904, while the marriage of the defendant took place in April or May 1903. Apart from the question, therefore, whether the articles supplied immediately before or after the marriage could be regarded as necessities, the question remains for consideration, whether the other articles supplied during a period of fifteen months before the marriage and about eighteen months after that event, fall within the category of necessities. It has been stated to us approximately that goods worth about Rs. 1,300 were supplied on the occasion of the marriage, and articles worth about Rs. 800 were supplied from time to time before and after the marriage. It is obvious that the matter has not been investigated with the fulness it deserved, and that neither of the Courts below has determined with reference to each article alleged to have been supplied, whether it was one in respect of which the plaintiffs were entitled to recover the value. It is manifest that in the interests of justice, the decisions of the Courts below must be discharged and the case re-investigated. To enable the lower Court to do so, we shall lay down the principles upon which the enquiry ought to proceed.

Under section 11 of the Indian Contract Act, every person is competent to contract who is of the age of majority

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according to the law to which he is subject. This section as interpreted by their Lordships of the Judicial Committee in *Mohori Bibee v. Dharmodas* (1) provides that no person is competent to contract who is not of the age of majority according to the law to which he is subject; in other words, that a minor is not competent to contract and that, therefore, a minor's agreement is void: *Dattaram v. Vinayak* (2) and *Kamta Prasad v. Sheo Gopal* (3). If, therefore, as previously indicated in *Watkins v. Dhunnoo Baboo* (4), a minor is a person incapable to contract within the meaning of section 11, section 68 of the Indian Contract Act becomes applicable to his case. Now section 68 provides that if a person incapable of entering into a contract—we quote only so much of the section as is applicable to the case before us—is supplied by any person with necessaries, suitable to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person. There is no definition of the term “necessaries” in the Act. We may consequently turn to judicial decisions to determine its precise import. Now it was ruled by Baron Parke in *Peters v. Fleming* (5) that “from the earliest time down to the present, the word ‘necessaries’ is not confined in its strict sense to such articles as were necessary to support life, but extended to articles fit to maintain the particular person in the state, degree and station in life in which he is; and therefore we must not take the word ‘necessaries’ in its unqualified sense but with the qualification as above pointed out.” This definition was adopted by the Exchequer Chamber in *Ryder v. Woombell* (6), in which it was stated that the rule of law is clearly established that an infant is generally incapable of binding himself by a contract, that to this rule, there is an exception introduced not for the benefit of the tradesman who may trust the infant, but for that of the infant himself, that this exception is that he may

(1) (1903) I. L. R. 30 Calc. 539;
L. R. 30 I. A. 114.

(2) (1903) I. L. R. 28 Bom. 181.

(3) (1904) I. L. R. 26 All. 342.

(4) (1881) I. L. R. 7 Calc. 140.

(5) (1840) 6 M. & W. 42;
55 R. R. 495.

(6) (1868) L. R. 3 Exch. 90:
4 Exch. 32.

make a contract for necessaries: see also *Walter v. Everard* (1). To put the matter concisely, "necessaries" means goods suitable to the condition in life of the defendant and to his actual requirements at the time of the sale and delivery, and whether an article supplied to an infant is necessary or not, depends upon its general character and upon its suitability to the particular infant's means and station in life. It must further be observed that as "necessaries" include everything necessary to maintain the infant in the state, station, or degree of life in which he is, what is necessary is a relative fact, to be determined with reference to the fortune and circumstances of the particular infant; articles therefore that to one person might be mere conveniences or matters of taste, may in the case of another be considered necessaries, where the usages of society render them proper for a person in the rank of life in which the infant moves. The infant's need of things may also sometimes depend upon the peculiar circumstances under which they are purchased and the use to which they are put. For instance, articles purchased by an infant for his wedding may be deemed necessary, while under ordinary circumstances the same articles might not be so considered: see *Jenner v. Walker* (2) in which it was ruled that wedding presents for the bride of the infant may be necessaries. To the same effect are the decision in *Juggessur Sircar v. Nilumbur Biswas* (3) and *Makundi v. Sarabsukh* (4). A further question may also arise, namely, was the infant in actual need of the things purchased. Though an article may belong to a class of things that are unquestionably necessary, and though the particular article furnished may correspond in quality and price with the infant's means, yet if it should turn out that the infant was already plentifully supplied with the thing purchased, it does not fall within the description of necessaries in that particular case. As observed by Lord Justice Lindley in *Johnstone v. Marks* (5), the true question is not a mere

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(1) [1891] 2 Q. B. 369.

(3) (1865) 3 W. R. 217.

(2) (1868) 19 L. T., N. S., 398.

(4) (1884) I. L. R. 6 All. 417.

(5) (1887) 19 Q. B. D. 509.

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abstract one, whether the articles supplied were in their nature necessities, but a practical question, whether they were necessary for the defendant, that is necessities to him, and they could not be, if he already had plenty of them. An infant may, consequently, show that he was already fully supplied with similar goods, and it is immaterial whether the plaintiff knew it or not: *Barnes v. Toye* (1). It is thus incumbent upon one who sells goods to an infant to enquire into his circumstances so as to determine not only whether the thing sold is such an article as an infant of the station in life of the purchaser would require, but whether in the particular case, the purchaser had need of it, for if the infant did not require it the seller cannot recover it. The reason for this rule is plain and was thus explained by Gibson C.J. in *Johnson v. Lymes* (2). "The rule of law is that no one may deal with a minor. The exception to it is that a stranger may supply him with necessities proper for him, in default of supply by any one else; but the stranger's interference with what is properly a guardian's business must rest upon actual necessity, of which he must judge in a measure at his peril. When he assumes the business of a guardian for the purpose of present relief, he is bound to execute it as a prudent guardian would and consequently make himself acquainted with his necessities and circumstances. The credit which the infant's necessities give him, ceases when these necessities cease, and as nothing further is requisite when these are relieved, the exception to the rule is at an end." We may further observe that the question as to what are necessities, is a mixed question of fact and law. It has been ruled in England that it is a question for the Court to decide whether certain classes of expenditure are necessities and what class or general description of articles are necessities, and it is for the jury to determine whether the particular articles fall within any of those classes, and whether they were actually necessary and suitable to the condition of the infant and were furnished under such circumstances as to authorise a recovery; the quantity, quality and

(1) (1884) 13 Q. B. D. 410,

(2) (1843) 6 Watts & Sergeant 80.

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value of what was furnished is of course a question for the jury : *Peters v. Fleming* (1), *Maddox v. Miller* (2) and *Wharton v. Mackenzie* (3). The person who seeks to recover for articles furnished to an infant on the ground that they were necessities is bound to prove that the articles were in their nature necessities suitable to the infant to whom they were supplied and were actually needed by the infant. But if there are special circumstances within the knowledge of the infant himself which make those articles not necessities, he may prove them ; for instance, that he was fully supplied with similar goods ; *Ford v. Fothergill* (4). With reference to the observation made by the learned District Judge that as the arrangements for the marriage were in charge of Gajadhar, the articles supplied could not be treated as necessities, we may point out that the mere fact that an infant has a father, mother or guardian, does not prevent his being bound to pay for what was actually necessary for him when furnished, if neither his parents nor guardian did anything towards his care or support. The test to be applied is whether the articles supplied were needed for the use of the infant : *Call v. Ward* (5).

The result, therefore, is that this appeal must be allowed, the judgment and decree of the District Judge set aside, and the case remitted to him for decision upon the question, whether the articles supplied were necessities on the principles already explained. The accounts produced by the plaintiffs-appellants must be carefully scrutinised and the case of each article or class of articles separately considered. If for the elucidation of any particular point, fresh evidence is found necessary, the District Judge will be at liberty to take evidence himself or to direct the Subordinate Judge to take it and to submit it to him for consideration. Costs of this appeal will abide the result.

S. A. A. A.

*Appeal allowed ;
case remanded.*

(1) (1840) 6 M. & W. 42 ; 55 R. R. 495. (3) (1844) 5 Q. B. 606 ; 64 R. R. 584.

(2) (1813) 1 M. & S. 738 ; 14 R. R. 565. (4) (1794) 1 Peake 301 ; 3 R. R. 695.

(5) (1842) 4 Watts & Sergeant 119.

PRIVY COUNCIL.

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[On appeal from the Chief Court of the Punjab at Lahore.]

Hindu law—Adoption—Evidence of Adoption—Adoption of Daughter's Son, validity of—Question not raised until too late a stage of the hearing—Estoppel by assent of Reversioner to Alienations by Widow—Power of Reversioner to bind later Reversioners—Reversioners claiming not through preceding Reversioner but through last male owner—Misjoinder of Causes of Action—Civil Procedure Code (XIV of 1882) s. 578.

The appellant's right to maintain a suit to set aside alienations of certain immoveable property made by the widow and the natural mother of the last male owner, who was the daughter's son of the original owner, depended on whether, as the appellants alleged, he was also his adopted son. On this question the Courts in India differed:—

Held, by the Judicial Committee, that on the evidence the adoption was established. It showed that, on the death of the original owner, the alleged adopted son succeeded to the estate without controversy which he could only have done as adopted son, and enjoyed it and disposed of it as his own, also without controversy, down to his death in 1870: almost every document both during his life and after his death was framed entirely on the basis of the adoption.

An objection to the validity of the adoption on the ground that under the Hindu law a daughter's son could not be adopted was only put forward for the first time at the very last stage of the hearing, after all the evidence was closed and nothing but argument remained. The decision depended on whether the rule of Hindu law had been varied by family custom:—

Held, that the District Judge was right in refusing to entertain at that late stage of the case a new question of that kind the solution of which must be dependent upon evidence.

The main defence to the suit was that the assent of the appellants' father to the transactions in dispute, not only estopped him from contesting the validity of the alienations, but created an estoppel binding his sons the appellants. As showing this a document dated 3rd September 1871 was produced which, after reciting that except his mother there was no heir to or claimant of the adopted son's property, stated that the widow agreed that during the mother's lifetime she should remain in possession of a half share

* *Present*: LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

of the property, and that after the death of the mother and the widow both the shares should devolve by inheritance on the sons of the mother, who were the natural brothers of the adopted son. This deed was signed by the father of the appellants who at that time was the only Reversioner. The Courts in India differed as to the effect of his concurrence in the deed :—

Held, that the division of her life-interest with the mother was an act which did not need the assent of the appellants' father ; and to provide for the descent of the inheritance after her death in a line different from that prescribed by law was a thing which the widow could not do either with or without his assent. There was, therefore, no estoppel on the Reversioner, and consequently none on his sons.

Another document relied on by the respondents was one of the alienations sought to be set aside. It was executed by the two ladies on 1st July 1888, and recited that they inherited the property in question from the original owner by virtue of right of succession and also by reason of the relinquishment of their rights by all the original owner's collateral heirs. They referred to the deed of 3rd September 1871 and stated that they, the executants, were absolute owners by exercising proprietary rights. They conveyed the land to the purchasers absolutely, and finally stipulated that neither they nor their heirs or descendants would ever raise any objection, nor would the original owner's collateral heirs whose rights, if any, "had been extinguished by their putting their signatures to this deed, and admitting it to be correct." This deed was also attested by, amongst others, the father of the appellants. The Courts in India again differed :—

Held, that the deed only bound the ladies and the collateral heirs of the original owner from whom they claimed to have derived title. It did not affect any title coming from the adopted son through whom the appellants claimed : they were, therefore, not estopped.

The ladies, the alienees, of the four separate alienations sought to be set aside, and the natural brothers of the adopted son were all made defendants in the present suit :—

Held, that it was very doubtful whether, on the strictest construction to be placed on the Civil Procedure Code, it could properly be said there was any misjoinder of causes of action ; but even if there was, section 578 of the Code had the effect of preventing such a defect from being made a ground of appeal on which the decree of the first Court could be reversed.

The decree of the Chief Court was reversed, and that of the District Judge restored.

APPEAL from a judgment and decree (10th June 1904) of the Chief Court of the Punjab, which reversed a judgment and decree (24th August 1901) of the District Judge of Umballa.

The plaintiffs were appellants to His Majesty in Council.

The main question for decision in the present appeal was whether certain alienations made by two Hindu ladies were

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binding on the Reversioners to the estate of the last male holder, one Wazir Singh.

The property in suit originally belonged to Sultan Singh who died early in the year 1861, and was succeeded by the said Wazir Singh who, according to the pedigree (which is set out sufficiently in the judgment of their Lordships of the Judicial Committee), was the eldest son of Sultan Singh's daughter, Puran Devi.

The appellants, grandsons of Sultan Singh's brother Narain Singh, claimed to be the next reversionary heirs of Wazir Singh, and their title depended on whether, as they alleged, Wazir Singh had been adopted by Sultan Singh.

Wazir Singh died on 25th October 1870 leaving him surviving his widow who succeeded to a life-estate in his property, and to whom a certificate to collect debts was granted under the provisions of Act XXVII of 1860. On 3rd September 1871 an agreement was come to between Sarsuti and Puran Devi in the following terms :—

"I, Musammat Sarsuti, daughter of Lala Tek Chand, and widow of Lala Wazir Singh, adopted son of Munshi Sultan Singh, deceased, caste Khatri, resident of Delhi, Muhalla Naughara, *Guzar Dariba*, do hereby declare as follows :—

"About ten months ago my husband died without leaving any issue. After his death I obtained a certificate of succession and came into possession of the property left by him. There is always some disagreement between myself and Musammat Puran Devi, sister of Lala Wazir Singh and daughter of Munshi Sultan Singh, as regards inheritance and the family belongings. With the exception of Musammat Puran Devi there is no other heir to or claimant of the said property. The parties, therefore, of their own accord and free-will have agreed that during my lifetime, Musammat Puran Devi should remain in possession of one-half share of the property, and that after the death of Musammat Puran Devi and myself, both the shares should devolve by inheritance on the sons of Musammat Puran Devi, who are the grandsons (daughter's sons) of Munshi Sultan Singh, the common ancestor.

"I have, therefore, drawn up these few lines in the form of a deed of partition, so that it may serve as an authority."

This document bore the signature of, among others, Gurdial Singh, the father of the appellants, who was at that time the nearest Reversioner. To one of the alienations to some of the defendants which was now sought to be set aside, Gurdial put his signature but only as a witness. The deed of sale

was dated 1st July 1888 and was executed by Sarsuti and Puran Devi in favour of the defendant Lala Shambhu Nath and others for Rs. 40,000. In this document it was recited as follows :—

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“ We own and possess an entire *katra* known as *Katra Choyan*, situate in *Bazar Chandi Chauk*, Delhi City, full description of which is given hereafter. We inherited this property along with other property from the late Munshi Sultan Singh by virtue of our right of succession, and also by reason of abandonment and relinquishment of their vested and contingent proprietary rights by all the collateral heirs of the said Munshi Sultan Singh, which rights the collaterals possessed in virtue of their being male descendants or for some other reason. We possess in addition two former title deeds, an agreement dated the 3rd September 1871, which was registered on the 5th October 1871. We, the executants, have been absolute owners of the property in question by exercising proprietary rights in respect of the same, as also in respect of other property regarding which we effected a permanent alienation without any obstruction on the part of the above-mentioned collaterals. At this moment we, with a view to liquidate the debts due by us which debts we thought expedient to incur in order to make such improvements to our other property as might have the effect of augmenting the income from rent and to prevent the addition of interest, have absolutely sold the property, a description of which is given hereafter, together with all its dimensions and external and internal rights.”

After naming the vendees, namely Lala Shambhu Nath, Lala Benarsi Das and Kidar Nath, three of the defendants, and that the vendors had received all the consideration money for the property, the document proceeded :—

“ After receiving the consideration money we, the vendors, have taken the property (sold) out of our proprietary possession, and have placed one-half of it in the possession of Lala Shambhu Nath, one of the vendees, and the other half, in the joint possession of Lala Benarsi Das and Babu Kidar Nath, vendees, in equal shares, and have made all the vendees in proportion to their respective shares joint absolute owners of the property in question. Henceforward all the above-named vendees shall be joint absolute owners of the property. All our proprietary rights in respect of the property sold have lapsed, and passed from us, vendors, to the vendees. Now and hereafter neither we nor our Reversionary heirs, nor any other persons coming forward as claimants by right of succession or by virtue of their being male descendants of the aforesaid family shall raise any sort of objection against the alienation of the property sold or in regard to the want of power of making a permanent alienation of it, or against any right (whether now existing or not) in the property ; or any plea as to non-payment of the value in full ; nor shall they have any sort of claim or concern as against the vendees, inasmuch as even if the heirs of the above-named Munshi had any sort of right (whether vested or contingent) in the property in question at all, such right

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has been extinguished by their putting their signatures to this deed and admitting its contents to be correct. If we or our heirs in contravention of the deed or contrary to our or their admissions take any objection or lay any claim to the property sold, such objection and claim shall be considered to be false, and in that case all the responsibilities and liabilities for costs and damages and for repayment of the sale money shall rest on our shoulders, and the vendees shall have a right to recover their money from our persons or from our personal property whether moveable or immoveable. We have, therefore, drawn up these few words in the form of a sale-deed so that it may serve as an authority."

The above was the last transfer deed made in the life-time of Gurdial, but both before and after his death other alienations of the property now in suit were made to other defendants, and on 14th June 1897 the appellants Jai Narain, who was born on 19th December 1871, and Rup Narain, who was born on 11th March 1876, instituted the suit out of which the present appeal arose, against Sarsuti and Puran Devi, her sons and the various alienees for a declaration that the alienations would not be binding on them as reversioners after the death of Sarsuti.

Two preliminary objections were taken to the suit, namely, that the plaintiff Jai Narain was not competent to maintain the suit, inasmuch as he had been adopted by the widow of one Brij Mohan and so had ceased to belong to his natural family; and that there was misjoinder of parties and of causes of action in the suit; and issues were raised on these objections. On these issues, the then District Judge held on 24th November 1897 that Jai Narain had not been adopted out of his natural family, and that he, therefore, could join his brother Rup Narain in the present suit. On the other preliminary issue he decided, after referring to the conflicting rulings of the High Courts in India that there was no misjoinder either of defendants or of causes of action.

The pleas set up in defence to the suit were substantially that it was barred by limitation; that Wazir Singh was not the adopted son of Sultan Singh; that assuming he was so adopted the plaintiffs could not succeed in this suit having regard to the settlement of family disputes embodied in the deed of agreement dated 3rd September 1871, concurred in

by Gurdial Singh, and having regard also to subsequent acts of the said Gurdial Singh which signified a relinquishment of his claims as Reversioner; that the alienations were made for necessary purposes to alienees who were parties to the alienations believing on good grounds that Gurdial Singh had relinquished his rights to the properties alienated: and that large sums had been spent by the alienees in improving the properties, and they were entitled to compensation in respect thereof if the alienations were declared void.

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On these pleadings issues were raised the final form of which was settled as follows by the District Judge who decided the case on the merits :—

“ 1. Was Wazir Singh the adopted son of Sultan Singh ?

“ 2. If so, did Gurdial Singh, who, after Wazir Singh's death, became the nearest Reversioner, and would inherit on the death of the widow Musammat Sarsuti, consent to the deed of 1871 (D.D.-I.), and thereby relinquish his claims to the property ? And did he consent to alienations of the property made in accordance with this deed, thereby confirming his act of relinquishment ?

“ 3. If so, does his relinquishment of his rights in the property and his consent to the alienations bind his sons, the plaintiffs, and estop them from suing ?

“ 4. Does the period of limitation begin from the execution of the deed of 3rd September 1871, or from what date does it begin, and are plaintiffs barred by limitation ?

“ 5. Was there legal necessity for each act of alienation ? ”

No issue was settled in respect of the plea of some of the defendants for compensation for improvements.

On these issues the District Judge held that Wazir Singh was the adopted son of Sultan Singh. He found from documents produced that the word “ khalaf ” was used in describing Wazir Singh, and that that word in such documents always signified “ son ” by birth or adoption, and on the documentary and circumstantial evidence he concluded as follows :—

“ In all the documents he was described as the ‘ son ’ or ‘ adopted son ’ of Sultan Singh or in words to that effect; defendants have produced no documents to the contrary effect. Also the documents produced show clearly that all parties interested nearly or remotely in the property of Sultan Singh either subscribed to or never contradicted the fact of Wazir Singh's adoption until the institution of the present suit. Thus the documentary evidence and the inference to be drawn from it are all in favour of Wazir Singh's adoption.

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The circumstantial evidence is equally convincing proof of the adoption. There is the fact that Wazir Singh lived with Sultan Singh in one house, while his brothers lived with their father and mother in another house. Wazir Singh's wife was brought to the house where Sultan Singh himself lived which did not happen in the case of the wives of the other brothers. On the death of Sultan Singh, Wazir Singh took out a succession certificate in his own name and received possession of the whole of Sultan Singh's large property, neither the widow (Ajudhia Devi) nor the daughter (Puran Devi) nor her other sons raising any protest even when Wazir Singh proceeded, as he undoubtedly did, to dissipate it by extravagant living The conduct of all parties concerned clearly indicates that Wazir Singh was regarded as the sole heir of Sultan Singh, and he certainly would not have been so regarded had there not been good grounds for so doing. On the death of Wazir Singh a succession certificate was taken out in the name of his widow Sarsuti It is easy to understand that a young widow in her position without a child and with only a life-estate in the property, and naturally under the influence of the elder women of the family would be willing in order to secure the family peace to surrender a share in the property either to her father-in-law's widow or to his daughter as she did by the document D. D.-I. of 3rd September 1871. On the other hand it is incredible that, if Wazir Singh had not been adopted, the immediate and future heirs would have allowed his widow who would have had no status at all a predominant share in the property as they did. Moreover, one of Sarsuti's first acts appears to have been to sell some of the property to pay off the personal debts of Wazir Singh in which the other members of the family had not benefited, an act which the Reversioners would never have permitted if Wazir Singh had not, to their knowledge, been the adopted son and heir of Sultan Singh.

"In short, the evidence proves conclusively that Wazir Singh was adopted, the only fact inconsistent with this conclusion being the conduct of Gurdial Singh, the next Reversioner, whose conduct, especially with regard to the document D. D.-I., it is now necessary to consider."

The District Judge also held after full consideration of all the circumstances in the case that as a matter of fact Gurdial Singh did consent to the deed of 3rd September 1871, and to alienations of the property in suit made in exercise of powers acquired under that deed. But he decided as a matter of law, after a consideration of the rulings of the High Courts in India on the question of how far the consent of the nearest Reversioner is binding on other reversioners, that "a Reversioner derived his title not from the last Reversioner, even though that reversioner be his father, but from the last full owner," especially in a case where, as here, "the last Reversioner had predeceased the widow, so that his interest had

become valueless and as though they never existed." He, therefore, held that the plaintiffs derived their title from Wazir Singh and not from Gurdial Singh, and that the surrender of his title by the latter and his consent to the alienations did not affect the plaintiffs' title, except so far as Gurdial Singh's consent might be evidence of the necessity for the alienations ; and that the plaintiffs were not thereby estopped from suing in the present case. On the question of limitation the District Judge held that the suit was not barred.

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He further found that there was no proof of any necessity for the alienations ; and that there was no evidence in support of the plea that any of the alienees had subsequently improved the properties.

On a point raised in argument before him as to the validity of Wazir Singh's adoption, the District Judge said :—

" It was contended that among the regenerate tribes, of whom the *Khatris* are one, the adoption of a daughter's son is not permissible, and that consequently Sultan Singh's adoption of Wazir Singh could not in any case have been valid. Though I allowed the point to be argued, I am now of opinion that not having been pleaded it should not be raised at the last stage of the hearing. I have, therefore, not considered it."

In the result the District Judge gave the plaintiffs a decree.

An application for review by two of the defendants on the ground that improvements effected in a portion of the property, though pleaded, was never brought into issue nor decided, was rejected the District Judge saying that in a case in which the parties were not ignorant persons, and were well represented by counsel, he considered it was clearly their duty to protect their own interests by applying, if necessary, for a revision of the issues during the 2½ years (April 1898 to December 1900), which elapsed from the date of framing the issues to the closing of the case, and that it could not be reopened on any one point after judgment had been passed.

The defendants appealed to the Chief Court of the Punjab (P. C. CHATTERJI and F. A. ROBERTSON JJ.), and in addition to the points raised in the issues took as grounds of appeal that the adoption of Wazir Singh, even if proved, was invalid ; and

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that the District Judge should have fixed an issue as regards the improvements and decided it.

The Chief Court held as to the adoption of Wazir Singh that as a matter of fact there was no reliable direct evidence : that the reference in the documentary evidence to Wazir Singh as “khalaf” of Sultan Singh was not conclusive, and that the description of him in the documents anterior to Sultan Singh’s death were also inconclusive as to the actual *factum* of adoption : that in documents subsequent to the death of Sultan Singh (as for instance in the succession certificate of 13th June 1861) the description of him were probably those given by Wazir Singh himself ; and that on Wazir Singh’s death it was only by the consent of his brothers that the succession certificate was granted to his widow Sarsuti. And they proceeded—

“We now come to the family settlement of 1871, which deserves special attention for many reasons. In this connection it is relied on by the plaintiffs because it mentions Wazir Singh as the adopted son of Munshi Sultan Singh.

“The above gives in brief the evidence in support of the *factum* of the adoption of Wazir Singh by Sultan Singh, and if it stood alone and unrebutted it would certainly be enough to raise at least a presumption in its favour. We do not propose to discuss the oral evidence at length. The lower Court considered it unreliable, and after going through it we do not consider that it materially strengthens the case for the plaintiffs. There are, however, several considerations which seem to negative the conclusion that there was any such adoption of Wazir Singh as to take him finally out of his natural family and to give the collaterals of Sultan Singh the right of collateral succession to Wazir Singh’s estate. In the first place there is no deed of adoption and no deed executed by Sultan Singh in which he recites or alludes to the adoption, and there is no direct evidence of any such formal adoption. The absence of this last may be satisfactorily explained, but the want is not supplied. Next we find that Sultan Singh had one daughter, who had five sons, all dependent on him. The evidence shows that all these sons at times lived with Sultan Singh, and Wazir Singh was the eldest and naturally the one who received most notice. It is exceedingly improbable that Sultan Singh would have so adopted Wazir Singh as to give him the whole inheritance and deprive such of his brothers as were then alive of any share in it, as well as others who might afterwards be born, leaving them destitute. But the most conclusive point against the *factum* of adoption is, in our opinion, the execution of the family settlement of 1871 and Gurdial Singh’s action in connection therewith.

“The reason why that settlement was come to is clearly recited in the deed itself, and there is no reason whatever to doubt that it was correctly stated.

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Gurdial Singh was undoubtedly, as was contended in the Lower Court, a man of affairs, a leader in the family and a very capable person. He was the Commissioner's *Muhafiz daftar*. This was the contention in the Lower Court, but Mr. Grey apparently quite overlooked this and argued the exact opposite before us, i.e., that he was young, inexperienced, incapable, under the influence of others and careless of his own interests. The former view is clearly the correct one. Yet we find Gurdial Singh, who must have known perfectly the whole truth about Wazir Singh's adoption, and who, had Wazir Singh been adopted by Sultan Singh as contended by the plaintiffs, would have been Wazir Singh's sole heir, not only signing the family settlement of 3rd September 1871, which clearly provided that after the death of Musammat Sarsuti, widow of Wazir Singh, and Musammat Puran Devi, daughter of Sultan Singh, the defendants, who are sons of Musammat Puran Devi, should succeed to the whole property, but in order to make assurance doubly sure we find him attesting the only deed of alienation made by the women in his lifetime, in which deed there is a full and clear recital of the rights of succession of the defendants and the relinquishment of all their rights by the collaterals of Sultan Singh. It is clear that every precaution was taken to avoid any possibility of misapprehension on Gurdial Singh's part, or of the meaning of his action. What the legal effect of his action on the rights of his sons may be will be discussed later. In this connection we note that Gurdial Singh showed clearly by his action that he did not believe himself to have any legal rights as regards Wazir Singh's property, i.e., that there had been no such adoption as would give him such rights. The recital that Wazir Singh was adopted son of Sultan Singh was obviously merely to satisfy Musammat Sarsuti, and we know how often such sacrifices are made to satisfy a masterful woman in a family. Having attained the substance the others would naturally not haggle over the form. And this compromise, a family settlement of 1871, was, it must be noted, originally drafted by Gurdial Singh himself, and it is witnessed by every member of the family, even to Bakhtawar Singh, Gurdial's father-in-law, and by several independent witnesses, including an Honorary Magistrate. Indeed, Gurdial Singh himself seems to have taken every precaution to make the settlement clear and final, and to prevent further disputes. Under these circumstances, we hold that it is not proved that Sultan Singh adopted Wazir Singh in such a manner as to give the plaintiffs, either by law or custom, any right to succeed collaterally to the estate of Wazir Singh. It follows that they are not Wazir Singh's Reversioners, and accordingly cannot maintain this suit. Some 'adoption of affection' there probably was, possibly some intention of adoption, but we find that no adoption is in fact proved to have been carried out.

"This decision in fact disposes of the whole case except the question of misjoinder, but we think it advisable to notice such further points as have been dealt with in the Lower Court."

The Chief Court held also that there was no misjoinder of plaintiffs; but that there had been misjoinder of causes of action, and the case did not satisfy the requirements of section

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28 or 45 of the Civil Procedure Code. They thought the proper course was to allow the plaintiffs to make their election which suit they would pursue without prejudice to their rights to bring fresh suits against the other defendants separately. The plaintiffs elected to proceed against the 5th defendant, Shambhu Nath, the claims against the other alienees were struck out, and the Court proceed to dispose of the claim as regards Shambhu Nath's alienation only, holding in concurrence with the District Judge that there was no legal necessity proved for the alienation, and that the consent of Gurdial Singh to the settlement of 3rd September 1871 and to the alienation, was established by the evidence on the record. As to the effect of Gurdial's acquiescence in the deed of settlement, the Chief Court reviewed at length the authorities of the High Courts in India and of the Chief Court of the Punjab, and having regard to the principles both of Hindu law and common equity, they held that the plaintiffs as sons of Gurdial were bound by his action in regard to the settlement of 3rd September 1871, and of the alienations made thereunder.

As to the two grounds not raised in the issues, the Chief Court said :—

“ As regards the question whether the validity of the adoption of Wazir Singh could be raised at the stage at which it was raised in the First Court, we are clear that it could be so raised. No doubt the reason why it is raised was the publication of the decision of their Lordships of the Privy Council that among twice-born classes, the adoption of a daughter's son is invalid. The respondents urge that on this point they are governed by custom, and that the onus of proving that the adoption of a daughter's son among *Khatri*s is invalid by custom lies on the appellants. With this we do not concur. The initial onus always lies upon any person who asserts that he is governed by a custom at variance with his general law to prove the particular custom he alleges. The question is very fully discussed in the Punjab Record 54 of 1903, with which judgment we concur. We think the plaintiffs were entitled to raise the point, and had it been necessary we should have made a remand for enquiry into the question. It is not now necessary.

“ As regards the claim of the defendants to be reimbursed for improvements, we think that attention was certainly drawn to the matter in the pleas, and we should have directed further enquiry as to this point also had it been necessary. It was overlooked by the Lower Court and no issue drawn.”

The result was that the decree of the District Judge was reversed and the suit dismissed with costs.

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On this appeal, in which the defendant Shambhu Nath was represented as respondent by his widow Gopal Devi,

Sir R. Finlay K.C., DeGruyther K.C., and Govind Sahai Sharma, for the appellants, contended for the reasons given by the District Judge that the evidence on the record proved that Wazir Singh was the duly adopted son of Sultan Singh. For the meaning of "khalaf" as descriptive of Wazir Singh, Wilson's Glossary was referred to. The contention raised that even if the adoption were made it was invalid was only put forward after all the evidence in the case had been given, and the District Judge was right in refusing to deal with it at that late stage of the case. The respondents were now precluded from denying its validity. As to persons who could be adopted, reference was made to Mayne's Hindu Law, 7th edition, pages 172 (bottom of page) and 175, paragraph 136.

Both the Courts in India having concurrently held that the alienations were not made for legal necessity, and that the consent of Gurdial Singh to the agreement of 3rd September 1871 and his acquiescence in the alienations were established by the evidence, it was contended that the Chief Court was in error in holding that Gurdial Singh's acts and conduct in giving such consent and acquiescence had the effect of binding the appellants. Gurdial Singh, it was submitted, did not thereby create any estoppel which would have precluded him from himself challenging the alienations; and even assuming that Gurdial Singh was estopped, his acquiescence in the deed of settlement and the alienations could not bind the appellants, who were born after the execution of the deed. All that Gurdial Singh relinquished, if anything, was an expectancy of succession, and as he died before Sarsuti, and never therefore perfected his Reversionary right, the appellants were not claiming through him but through Wazir Singh, and the surrender of his title by Gurdial Singh did not estop the appellants from maintaining the present suit. Sarsuti had no power

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to change the line of descent of the property in which she had only a life-estate, and no consent or acquiescence of Gurdial Singh could prevent that portion of the deed from being otherwise than illegal and void, because in excess of her powers; nor, it was submitted, could Gurdial Singh's consent convert Sarsuti's life-estate into an absolute one, so as to adversely affect the appellants' Reversionary rights which were derived not from him but from the last full owner, Wazir Singh. Reference was made to *Bahadur Singh v. Mohar Singh* (1), *Bhagwanta v. Sukhi* (2), *Collector of Masulipatam v. Caraly Venkata Narainpah* (3), *Rajlukhee Dabea v. Gobind Chunder Chowdhry* (4), *Behari Lal v. Madho Lal Akir Gyawal* (5), *Hem Chunder Sanyal v. Sarnamoyi Debi* (6), *Nobokishore Sarma Roy v. Hari Nath Sarma Roy* (7), *Jiwan Singh v. Misri Lal* (8), *Sham Sundar Lal v. Achhan Kunwar* (9), *Bajrangi Singh v. Manokarnika Singh* (10), *Sohun v. Ram Dial* (11), and Mayne's Hindu Law, 7th edition, page 204 (end of para. 157); 6th edition, 200.

As to misjoinder it was submitted that the Chief Court was wrong in holding that there was misjoinder of causes of action, and in making the appellants select one of the alienees to proceed against, and striking out the claims against the others. But even if the causes of action were wrongly joined it was an irregularity from which the respondents had suffered no injury, and one not affecting the merits of the case, or the jurisdiction of the Court within the meaning of section 578 of the Civil Procedure Code, and therefore not a ground on which the Chief Court should have reversed the decree of the District Judge on appeal: *Param v. Achal* (12) was referred to.

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| (1) (1901) I. L. R. 24 All. 94, 105 ; | (7) (1884) I. L. R. 10 Calc. 1102, 1107. |
| L. R. 29 I. A. 1, 8, 9. | (8) (1895) I. L. R. 18 All. 146, 155 ; |
| (2) (1899) I. L. R. 22 All. 35 | L. R. 23 I. A. 1, 6. |
| (3) (1861) 8 Moo. I. A. 529, 549, 555. | (9) (1898) I. L. R. 21 All. 71, 82 ; |
| (4) (1869) 13 Moo. I. A. 209, 228, 229. | L. R. 25 I. A. 183, 189. |
| (5) (1891) I. L. R. 19 Calc. 236 ; | (10) (1907) I. L. R. 30 All. 1 ; |
| L. R. 19 I. A. 30. | L. R. 35 I. A. 1. |
| (6) (1894) I. L. R. 22 Calc. 354. | (11) (1901) 36 Punj. Record 253, 259. |
| (12) (1882) I. L. R. 4 All. 289. | |

Reference was also made to the Limitation Act (XV of 1877), Schedule II, Arts. 125, 140, and 141. [*Jardine K.C.* said that he did not intend to support the plea of limitation.]

Jardine K.C. and *Ross*, for the respondents, contended, for the reasons given by the Chief Court, that the appellants had failed to prove the *factum* of the adoption on which their title depended. But even if proved, the adoption was invalid, the adoption of a daughter's son being illegal by Hindu Law: *Bhagwan Singh v. Bhagwan Singh* (1) was referred to. This point could, it was submitted, have been raised at any stage of the case, and the District Judge was not right in allowing it to be raised in argument, and then not deciding it but holding that not having been taken in the pleadings, it could not be raised at the last stage of the hearing.

It was also contended that the agreement dated 3rd September 1871 was the settlement of a disputed succession, and as such was attested and agreed to not only by Gurdial Singh, but by all the members of the family interested in the dispute. Both the lower Courts had concurrently found that Gurdial Singh, by signing the deed of 3rd September 1871, consented to the surrender of all his reversionary rights in the property. He was then the sole living Reversioner of Sultan Singh and was competent by his assent to validate the settlement made by Sarsuti and Furan Devi in that deed. Having done so, the appellants were estopped from now contesting the deed and the alienations thereafter effected.

As to misjoinder the decision of the Chief Court was correct. If the alienations be held void as against the appellants, the respondents would be entitled to compensation for improvements. As to that point, though it was pleaded in the written statements, no issue upon it was settled by the Court, and a review on that ground was rejected.

Sir R. Finlay K.C., in reply. Before any compensation could be allowed there must be an inquiry as to the value of the alleged improvements: the matter could not be dealt with now.

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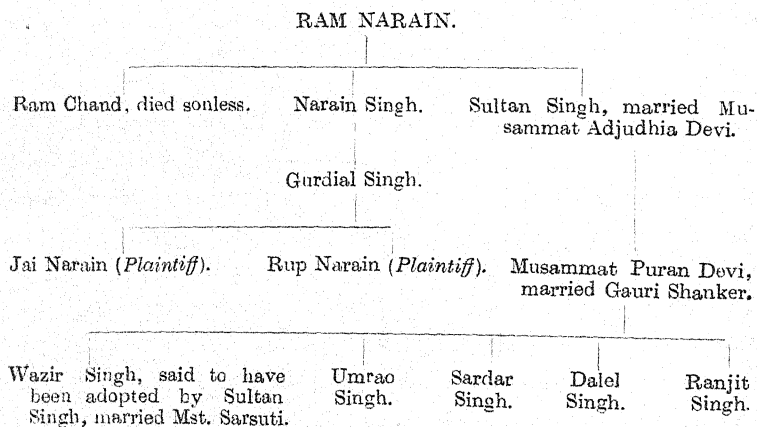
(1) (1899) I. L. R. 21 All. 412; L. R. 26 I. A. 153.

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The judgment of their Lordships was delivered by
 SIR ARTHUR WILSON. The suit out of which this appeal
 arises was brought by the present appellants against a number
 of persons as defendants. The plaintiffs, alleging themselves
 to be prospectively reversionary heirs to an estate now en-
 joyed by two ladies, claimed a declaration that certain aliena-
 tions, four in number, of portions of the estate made by those
 ladies were not binding on the Reversioners.

Both Courts in India have agreed that there was no such
 legal necessity as could justify the alienations; and their
 Lordships have not been asked to review that finding.

The questions which do arise are of quite a different cha-
 racter. It is necessary to follow the pedigree of the family
 in order to appreciate the contentions raised on each side.
 The pedigree, so far as material, is as follows :—



The properties in question formed part of the estate of
 Sultan Singh, who died in 1861. He was succeeded by Wazir
 Singh. Wazir, as will be seen by the pedigree, was the eldest
 son of Sultan's daughter, and, according to the case of the
 plaintiffs, was adopted by Sultan.

It is not disputed that, if Wazir was the adopted son of
 Sultan, the present plaintiffs are competent to maintain this
 suit as reversionary heirs of the estate of Wazir. If Wazir

was not such adopted son, the plaintiffs (appellants) have no right to sue.

The first important question, therefore, is whether Wazir was the adopted son of Sultan.

On this question the Courts in India have differed. The District Judge of Umballa, who tried the case, thought the adoption proved. The Chief Court took a different view. The adoption, if it took place, was about fifty years ago, so that direct evidence of much value could hardly be looked for.

Their Lordships are of opinion that the adoption is established. Before the death of Sultan in 1861 Wazir is described as his adopted son. On the death of Sultan, Wazir succeeded to the estate without controversy, which he could only have done as adopted son, and enjoyed it and disposed of it as his own without controversy down to his death in about 1870. Almost every document, both during the life of Wazir and since his death, is framed entirely upon the basis of the adoption.

It was sought to raise another point in connection with the adoption, that if it took place in fact, it was invalid in law on the ground that under Hindu law a daughter's son could not be adopted. With this point their Lordships think the District Judge dealt rightly. The general rule of Hindu law cannot be disputed, but it may be varied by family custom, and often is so varied in the province from which this appeal comes. If the legal point had been duly raised in proper time by the pleadings or issues, it would have been examined with the aid of any evidence adduced on either side bearing upon the question. But it was not so raised. It was put forward for the first time at the very last stage of the hearing after all the evidence was closed, and when nothing but argument remained. Their Lordships think that the District Judge was right in refusing to entertain at that stage a new question of this kind of which the solution must be dependent upon evidence.

For these reasons their Lordships are of opinion that the appellants have established their right to maintain the present suit.

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The second question of importance is as to the effect of the alleged assent of one Gurdial Singh, the father of the plaintiffs, to the disputed transactions or some of them. Gurdial witnessed an important document of the 3rd of September, 1871, and one of those of transfer, and it was said that by so doing he was estopped from disputing the validity of the alienations, and that his sons, the now appellants, were similarly estopped.

On this question the first Court decided in favour of the plaintiffs; the Chief Court of the Punjab held otherwise, and considered that the estoppel contended for bound Gurdial, and also the plaintiffs, his sons. This decision involves two propositions—*first*, that Gurdial was estopped, and *secondly*, that the estoppel was binding upon his sons. The second of these propositions it is immaterial to consider unless the estoppel against Gurdial is first accepted; and, in order to see whether it should be so accepted or not, it is necessary to examine the documents upon which it is based. The document of the 3rd September, 1871, is the most important of them, and it affords a very clear indication of the positions taken up by the parties. It purported from its title to be a deed of partition executed by Sarsuti, the widow of Wazir, in favour of Puran Devi, his natural mother.

The most notable point about this deed is that according to its term Sarsuti is the only person who conveys anything, and this is in accordance with the recitals, which alleged that Wazir was the adopted son of Sultan Singh, and that Sarsuti, Wazir's widow, had succeeded him on his death. The next notable point about the deed is that, with the exception of the last few lines of the operative part, everything contained in the deed is within the rights of the executant as heiress of her husband, because she purports to deal only with her life estate. The exception in those last few lines purports to affect the devolution of the inheritance after the deaths of Sarsuti and Puran, which was clearly beyond Sarsuti's powers as the widow of Wazir.

The contention being that Gurdial, by having signed this deed, became an assenting party to the transaction embodied

in it, it is necessary to consider what the nature of that transaction is. It is one by which Sarsuti professes to divide her life-interest with Puran, which she could do without any assent of Gurdial. It purports, secondly, to provide for the descent of the inheritance after her death in a line different from that prescribed by law, a thing which apparently she could not do either with or without the consent of reversioners.

The second document relied upon was one dated the 1st July, 1888, purporting to be the deed of sale by Sarsuti and Puran containing one of the alienations impugned in the suit. The most obvious peculiarity of this document is that it is framed on a basis altogether inconsistent with that of the document last referred to.

It recites that the two ladies inherited the property in question with other property from Sultan Singh by virtue of their right of succession, and also by reason of abandonment and relinquishment of their rights by all the collateral heirs of Sultan. They then refer to the document of the 3rd September, 1871, and another document. They say that they, the executants, have been absolute owners by exercising proprietary rights. They go on to convey the land to the purchasers absolutely, and they proceed:—

“Now and hereafter neither we nor our reversionary heirs nor any other persons coming forward as claimants by right of succession or by virtue of their being male descendants of the aforesaid family shall raise any sort of objection Even if the heirs of the family of the above-named Munshi had any sort of right, whether vested or contingent, in the property in question at all, such right has been extinguished by their putting their signatures to this deed and admitting its contents to be correct.”

The deed was executed by Sarsuti and Puran and witnessed, amongst others, by Gurdial.

Assuming that Gurdial effectually assented to this document, the document itself must be looked at, in order to see what it was that he assented to. And on the face of the document, it is clear that all it professes to do is to bind the ladies themselves who executed the deed, and the collateral heirs of Sultan from whom they claim to have derived title. It does not profess to affect any title coming from Wazir.

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But the present plaintiffs claim title from Wazir, and are therefore unaffected by any estoppel arising from Gurdial's assent to the deed.

Another point raised on behalf of the respondents was that, at any rate, the respondents, or some of them, had spent money upon the properties purchased by them, and that such persons could not be evicted without compensation. On this point it is enough to say that it does not arise on this appeal, and cannot arise till the death of Sarsuti. Their Lordships therefore have only to say that they abstain from expressing any opinion upon the question and from saying anything which could tend to prejudge the question in case it should be raised hereafter in due time and in due manner.

Another question discussed in argument was whether the Chief Court was right in the mode in which it dealt with an alleged misjoinder of causes of action. Their Lordships think it is at least very doubtful whether, upon the strictest construction to be placed upon the Procedure Code, it can properly be said that there was any misjoinder in this case. And if there was any such misjoinder, section 578 of the Code has, in their Lordships' opinion, the effect of preventing such a defect from being made a ground of appeal and from being dealt with on appeal as it was dealt with by the Chief Court.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed, the decree of the Chief Court set aside with costs, and the decree of the District Court restored, but with costs in favour of the plaintiffs, and without prejudice to the right of such of the respondents as claim to have expended money on the properties respectively purchased by them to raise the question of compensation in such manner as they may be advised.

The respondents will bear the costs of this appeal.

J. V. W.

Appeal allowed.

Solicitors for the appellants : *T. L. Wilson & Co.*

Solicitors for the respondents : *Hartcup, Davis & Cobbold.*

TESTAMENTARY JURISDICTION.

Before Mr. Justice Harington.

SARAT CHANDRA BANERJEE

v.

NANI MOHAN BANERJEE.*

1909
May 17.

Right to sue, survival of—Abatement of suit—Civil Procedure Code (Act V of 1908), Order XXII, Rule 1—Application for Probate by Executor—Death of Executor—Application for Letters of Administration in same suit, by Legal Representative of Executor.

On an application by a sole executor for grant of probate, a *caveat* was entered, and the matter was set down as a contentious cause. Pending the hearing, the executor died. Thereupon his widow and legal representative applied to have her name substituted for his, and to have the petition for probate amended by substituting a prayer for letters of administration with copy of the will annexed, in place of the prayer for probate.

Held, that the application must be refused, as the right to sue had not survived, and the suit had abated.

APPLICATION in Chambers.

On the 26th June 1906, Sreemutty Annapurna Debi, a Hindu lady, governed by the Bengal School of Hindu Law, died leaving a will dated the 12th March 1902, whereof she had appointed one Sarat Chandra Banerjee executor. On the 31st July 1908, Sarat Chandra Banerjee applied for grant of probate, whereupon one Nani Mohan Banerjee entered a *caveat*. The matter came on for argument on *caveat* on the 25th August 1908, and it was ordered that the matter be set down as a contentious cause. Pending the hearing and on the 26th February 1909, Sarat Chandra Banerjee, who was the residuary legatee as well as executor under the will, died intestate leaving his widow Sreemutty Pramoda Debi and two married daughters, him surviving.

Thereupon, the present application was made by Sreemutty Pramoda Debi for an order that the death of her husband, the plaintiff, be recorded, and that her name, as his sole widow and

* Application in Original Civil Suit No. 9 of 1909.

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heiress, may be substituted for his, and that the suit be proceeded with, and the petition for probate be amended, by substituting a prayer for grant of letters of administration with copy of the will annexed in place of the prayer for grant of probate.

The application was in the first instance made to the Master who, on the 29th April 1909, referred the matter under Rule 515A to Harington J. in Chambers.

Mr. B. C. Mitter, for the petitioner. This matter falls within the scope of Order XXII, Rule 1 of the Civil Procedure Code. On the death of the executor the suit did not abate, but the right to sue survived in favour of his legal representative.

Mr. C. R. Das (Mr. A. N. Chaudhuri with him), for the opposite party. The right to sue did not survive on the death of the executor, and the suit has abated. The applicant's proper course would be to apply for letters of administration with copy of the will annexed, and that would involve a fresh suit.

HARINGTON J. This is an application by the widow of one Sarat Chandra Banerjee that her husband's death may be recorded, and her name may be substituted for his, and that the petition for probate may be amended by substituting a prayer for letters of administration to the will annexed instead of a prayer for probate.

The facts are that Annapurna Debi died in 1908 leaving a will. Sarat Chandra Banerjee applied for probate, but was met by Nani Mohan Banerjee who entered a *caveat*.

The matter was ordered to be set down as a contentious cause. Pending the hearing Sarat Chandra Banerjee, who was residuary legatee as well as executor under the will, died. The present application is made by his sole widow and heiress.

In my opinion the application must be refused because the right to sue does not survive. The right, which Sarat Chandra Banerjee had, was to propound the will. On the

Court's granting probate, he would be entitled not by virtue of the order of the Court but by the appointment contained in the will to possession of the deceased's property, and he would become, by virtue of the act of the deceased, his legal personal representative.

But the right, which the present applicant has, is an entirely distinct one. She asks to be appointed to represent the deceased by the Court, and claims no right derived from any appointment by the testator.

She must satisfy the Court of two things—(i) that she is the person to whom letters of administration ought to be granted; and (ii) that the will was duly executed.

In my opinion, the right to sue in Order XXII means the right to bring a suit asserting a right to the same relief which the deceased plaintiff asserted at the time of his death, and that a right to obtain probate of a will is a right different in its nature from a right to be appointed by the Court to administer the deceased's estate.

I think, therefore, that the suit abates under Order XXII, Rule 1, and the application must, therefore, be refused.

J. C.

Application refused.

Attorneys for the petitioner: *Fox & Mandal.*

Attorneys for the opposite party: *S. D. Dutt & Ghosh.*

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APPELLATE CIVIL.

Before Mr. Justice Stephen and Mr. Justice Vincent.

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May 18.

ULFAT HOSSAIN

v.

GAYANI DASS.*

Merger—Mokarari interest—Merger of mokarari interest in superior landlord's interest—Transfer of Property Act (IV of 1882) ss. 2 cl. (c), (d); 111 cl. (d).

The original owner of a share in a certain *mouza* granted a *mokarari* of it to her grandson, W., conditional on her daughter, F., enjoying the *usufruct* of the *mokarari* for life, and subsequently she sold to her daughter her proprietary interest in the share. Prior to the sale of the proprietary interest, but subsequent to the grant of the *mokarari* and the *usufruct*, the original owner and the *mokararidar* mortgaged their interest to R. On the 17th September 1892, the defendant purchased the *mokararidar's* interest in the share subject to the mortgage. On the 7th October 1898, R. obtained a decree in a suit brought on his mortgage against F., W. and the defendant, and finally became the purchaser of the proprietary and the *mokarari* interest of the share at an auction sale. The defendant, however, failed to exercise his right of redemption. In consequence of default made in payment of the revenue, R.'s interest in the property was sold on the 25th April 1899 under the Revenue Sale Law, and was purchased by D. A further default having been made by D., the latter's interest in the property was sold and the plaintiff purchased the same. The plaintiff, thereupon, brought a suit for *khas* possession and mesne profits against the defendant who claimed the *mokarari* interest under his purchase from W. subject to the R.'s mortgage:—

Held, that the *mokarari* merged in the proprietary rights in the hands of R., and that the case was governed by the Transfer of Property Act, s. 111 (d).

Raja Kishendatt Ram v. Raja Mumtaz Ali Khan (1) and *Surja Narain Mandal v. Nanda Lal Sinha* (2) followed.

Jibanti Nath Khan v. Gokool Chunder Chowdry (3) and *Promotho Nath Mitter v. Kali Prasanna Chowdhry* (4) discussed.

SECOND APPEAL by Ulfat Hossain, the plaintiff.

The facts are briefly as follows:—

Musammatt Razihan was the original owner of a share

* Appeal from Appellate Decree, No. 1323 of 1907, against the decree of H. W. C. Carnduff, District Judge of Patna, dated May 9, 1907, confirming the decree of Tarak Chander Dass, Subordinate Judge of Patna, dated March 30, 1906.

(1) (1879) I. L. R. 5 Calc. 198.

(3) (1891) I. L. R. 19 Calc. 760.

(2) (1906) I. L. R. 33 Calc. 1212.

(4) (1901) I. L. R. 28 Calc. 744.

in a certain *mouza*. On the 9th November 1875, she granted a *mokarari* of it to her grandson, Waizuddin, with a condition that her daughter, Fazilan, should enjoy the *usufruct* of the *mokarari* for her life, and subsequently on the 28th September 1898, she sold her proprietary interest to Fazilan.

On the 22nd September 1884, both the proprietary interest and the *mokarari* were mortgaged by Musammât Razihan and Waizuddin to Rai Radha Kissen Bahadur.

On the 17th September 1892, the defendant, Gayani Dass, purchased the *mokarari* interest of Waizuddin.

On the 7th October 1898, Radha Kissen obtained a decree in a suit brought on his mortgage against Fazilan, Waizuddin and the defendant, and on the 15th April 1899 this decree was made absolute. Subsequently on the 16th August 1899, Radha Kissen became the purchaser at the auction-sale held in execution of the mortgage decree and obtained a sale certificate on the 15th September 1899. The defendant, however, failed to exercise his right of redemption.

After the mortgage decree of Radha Kissen and before his purchase, *viz.*, on the 25th April 1899, his interest in the property was sold under the Revenue Sale Law in consequence of default made in payment of the revenue and was purchased by one Dharam Singh. A further default was subsequently made by Dharam Singh and the latter's interest in the property was put up to sale under the Revenue Sale Law. On the 4th January 1900, the plaintiff purchased the same.

On the 12th February 1903, Radha Kissen obtained an *ex parte* decree against Dharam Singh and the other former proprietors of the share in suit, and on the 6th May 1905 he received from the Collector the surplus sale-proceeds of the plaintiff's purchase on the basis of the *ex parte* decree.

The plaintiff brought this suit for recovery of *khas* possession with mesne profits of the share in suit from the defendant and for ousting the latter from the same. Both the Original Court and the lower Appellate Court dismissed the suit. The plaintiff thereupon appealed to the High Court.

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Moulvi Shamsul Huda, for the appellant. The *mokarari* interest had merged in the superior interest in consequence of the purchase by the mortgagee, *Radha Kissen*, at the auction-sale of both the proprietary and the *mokarari* interests of the mortgagors of the two interests and the plaintiff is the purchaser of these interests sold at a Revenue Sale. I rely on section 111 (d) of the Transfer of Property Act and *Raja Kishendatt Ram v. Raja Mumtaz Ali Khan* (1) and *Surja Narain Mandal v. Nanda Lal Sinha* (2). The case of *Jibanti Nath Khan v. Gokool Chunder Chowdry* (3) is decided irrespective of the Transfer of Property Act: *Promotho Nath Mitter v. Kali Prasanna Chowdhry* (4) and *Prosunna Nath Roy v. Jogut Chunder Pundit* (5). With respect to the equitable doctrine of merger, I submit, it applies, independent of the Transfer of Property Act, to the *mofussil*, though its application was questioned in the case of *Womesh Chunder Goopto v. Raja Narain Roy* (6).

Dr. Rashbehary Ghose (*Babu Digamdar Chatterjee* with him), for the respondent. There is no merger in this case, and the question is concluded in *Jibanti Nath Khan v. Gokool Chunder Chowdry* (3), which is directly in my favour. The *mokarari* lease in suit was created before the Transfer of Property Act was passed and, therefore, section 111 (d) is inapplicable. In *Surja Narain Mandal v. Nanda Lal Sinha* (2), the Court merely expresses an opinion. The doctrine set out by the Judicial Committee in *Raja Kishendatt Ram v. Raja Mumtaz Ali Khan* (1) is not founded on the doctrine of merger, but on another doctrine which will be found at page 210 of the report. The case of *Promotho Nath Mitter v. Kali Prasanna Chowdhry* (4) is distinguishable. I rely on *Foa's Landlord and Tenant*, 4th edition, page 646.

Moulvi Shamsul Huda, in reply.

Cur. adv. vult.

STEPHEN AND VINCENT JJ. This is a suit brought for a declaration that the plaintiff as purchaser at a Government

(1) (1879) I. L. R. 5 Calc. 198.

(2) (1906) I. L. R. 33 Calc. 1212.

(3) (1891) I. L. R. 19 Calc. 760

(4) (1901) I. L. R. 28 Calc. 744.

(5) (1878) 3 C. L. R. 159.

(6) (1868) 10 W. R. 15, 17.

Revenue Sale is the proprietor of a 2 annas 5 gundas and odd share in a certain *mouza* and for possession thereof.

The facts, as far as they are material to the questions we have to decide, are as follows. The share in question originally belonged to one Musammat Razihan. In 1875, she created a *mokarari* of which her daughter Musammat Fazilan was tenant for life with a remainder to her son Waizuddin. In 1878, she transferred the proprietary interest to Musammat Fazilan. In 1884, Fazilan and Waizuddin mortgaged the share to Rai Radha Kissen Bahadur. In 1892, Mohanth Gayani Dass, the present defendant-respondent, purchased the interest of Waizuddin, that is his equity of redemption in the *mokarari*. On the 15th of April 1899, Rai Radha Kissen got a decree absolute in a mortgage suit in which Waizuddin, Fazilan, and Gayani Dass, among others, were defendants, and became purchaser at the auction sale held in pursuance thereof, the sale certificate being dated 15th of September in the same year. Before this sale, however, the proprietary interest in the share in suit had been brought to sale at a Revenue Sale on the 25th April 1899, and had been bought by one Dharam Singh. In 1900, there was another Revenue Sale and the plaintiff-appellant was the purchaser. Against his claim for possession, the defendant sets up the *mokarari* which he alleged is still in existence and which the plaintiff did not acquire by his purchase, which was subject to it as being a prior encumbrance. The lower Appellate Court has held that this contention must prevail, because the *mokarari* was in existence at the time of the second Revenue Sale. As he rightly says, the case turns on a question of merger, and we must see whether merger has or has not in fact occurred.

It is not suggested that the sale to Dharam Singh can effect the case, and it is not denied that the effect of the sale to Rai Radha Kissen in the mortgage suit was to vest in him the life estate of Musammat Fazilan, the reversionary interest of Waizuddin in the *mokarari*, and also the proprietary interest of Razihan in the share in question.

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In the first place, the appellant contends that the case is governed by the Transfer of Property Act, section 111 (d) in which case it is not denied that the *mokarari* merged in the proprietary interest as soon as both came into Rai Radha Kissen's hands. The respondent argues, however, that section 2 (c) of that Act prevents the application of section 111 (d). Were it not for paragraph (d) of section 2, we should be inclined to hold that section only saved the effect of the repeals that it enacts in the cases specified : and that the word "herein" meant "in this section" and not "in this Act." Without, however, considering this view, which seems to be contrary to that of Banerjee J. in *Promotho Nath Mitter v. Kali Prasanna Chowdhry* (1), we do not see how to apply clause (c) to the present case in the way that recommended itself to the lower Appellate Court. The section enacts that nothing "herein (*i.e.*, in the Act if we take it so) contained shall be deemed to effect any right or liability arising out of a legal relation constituted before this Act came into force." The right or liability which the respondent desires to set up is the right of the original *mokararidar*, Waizuddin, to hold his *mokarari* unaffected by section 111 (d) of the Act if the *mokarari* and the parent estate both came into his hands, and this right, he contends, must be passed on to Rai Radha Kissen, the purchaser of the *mokarari*. This is, in our opinion, an incorrect view. The right in this case to which clause (c) must apply, if it applies at all, is the right of Radha Kissen to the same effect, and it was constituted by his legal relation to the defendants in the mortgage suit at the time of the mortgage-sale, which took place after the passing of the Transfer of Property Act. We hold, therefore, that there is nothing to prevent section 111 (d) of the Act from applying and that a merger has taken place.

Even supposing that the case is taken out of the scope of section 111 (d), we are unable to agree with the decision of the lower Appellate Court. In *Surja Narain Mandal v. Nanda Lal Sinha* (2), the decision in *Raja Kishendatt Ram v.*

(1) (1901) I. L. R. 28 Calc. 744, 750. (2) (1906) I. L. R. 33 Calc. 1212, 1217.

Raja Mumtaz Ali Khan (1) is treated as an authority for the proposition that apart from the effect of the Transfer of Property Act a *mokarari* interest would merge in a superior tenure. It is true that in *Jibanti Nath Khan v. Gokool Chunder Chowdry* (2) and in *Promotho Nath Mitter v. Kali Prasanna Chowdhry* (3), a different opinion may seem to have been expressed, but in the earlier of these cases the owners of the zemindari interest elected to treat a *putni* interest they had acquired in their own *zemindari* as subsisting, and both cases were decided without reference to the case of *Raja Kishendutt Ram v. Raja Mumtaz Ali Khan* (1). It is true, as has been argued before us, that that case was decided on the respective rights of a mortgagor and mortgagee, but the fact that the *brits* merged in the *talukdars'* interest is an essential portion of the grounds for the decision arrived at. Considering the authority of this case and the view that has been taken of its application in *Surja Narain Mandal v. Nanda Lal Sinha* (4) we consider that we must treat the *mokarari* as having merged in Rai Radha Kissen's superior interest. It has been attempted to show that Rai Radha Kissen treated the *mokarari* interest as subsisting after his purchase, and that it would have been to his interest to do so; because in the event of a Revenue Sale of the share it would not have been affected. There is no direct evidence that he did so treat it, and the argument that he must be taken to have done so to protect himself against a Revenue Sale seems to be amply met by the fact that a Revenue Sale took place within a year of his purchase, and yet he has in his statement of claim expressly disclaimed any right to take advantage of the *mokarari*.

We, therefore, hold that the *mokarari* merged in the proprietary rights in the hands of Rai Radha Kissen. The appellant is, therefore, entitled to judgment and to his costs in this Court and both the Courts below.

O. M.

Appeal allowed.

(1) (1879) I. L. R. 5 Calc. 198.

(3) (1901) I. L. R. 28 Calc. 744.

(2) (1891) I. L. R. 19 Calc. 760.

(4) (1906) I. L. R. 33 Calc. 1212.

APPELLATE CRIMINAL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Mookerjee.

1909

June 1.

RAKHAL CHANDRA LAHA

v.

EMPEROR.*

Sanction for prosecution, terms of—Perjury, assignment of—Charges relating to several false statements in the same deposition—Mis-joinder—Reading deposition to witness in the presence of a pleader for one of several accused—Interpreter, omission to administer oath to—Admissibility of Deposition and proof of Statement of the Witness on a subsequent trial for Perjury—Criminal Procedure Code (Act V of 1898) ss. 195 cl. (4), 234, 360 cl. (1) and 537—Penal Code (Act XLV of 1860) s. 193—Oaths Act (X of 1873) ss. 5 (b), 13.

Although s. 195. cl. (4), does not in express terms render an assignment of perjury necessary, the application for sanction and the order granting it, in respect of statements contained in a lengthy deposition, should specify the particular statements alleged to be false, but the omission to do so is a defect cured by s. 537, unless a failure of justice has in fact been established.

Where the alleged false statements were not set out in the order of sanction but were specified in the application for it and also in the charges subsequently framed :—

Held, that the accused was not prejudiced by the omission in the sanction.

Balwant Singh v. Umed Singh (1), *Queen v. Kartick Chunder Holdar* (2), *Queen v. Gobind Chunder Ghose* (3), *Queen v. Boodhun Ahir* (4), *In re Jivan Ambaidas* (5), *Goberdhone Chowkidar v. Habibullah* (6) and *Queen v. Soonder Mohoorce* (7) referred to.

The making of any number of false statements in the same deposition is one aggregate case of giving false evidence, and such charges cannot be multiplied according to the number of false statements contained in a deposition.

Mad. H. C. Pro., 1st May 1871 (8) followed.

Section 360 (1) is sufficiently complied with if the deposition of a witness is read over to him in the presence of a pleader for one out of twenty-seven

* Criminal Appeal, No. 334 of 1909, against the order of E. E. Forrester, Sessions Judge of Midnapore, dated March 29, 1909.

(1) (1896) I. L. R. 18 All. 203.

(5) (1894) I. L. R. 19 Bom 362.

(2) (1868) 9 W. R. Cr. 53.

(6) (1897) 3 C. W. N. 35.

(3) (1868) 10 W. R. Cr. 41

(7) (1868) 9 W. R. Cr. 25.

(4) (1872) 17 W. R. Cr. 32.

(8) (1871) 6 Mad. H. C. xxvii.

accused. A deposition so read over is admissible against the witness on his trial subsequently for giving false evidence.

Kamatchinathan Chetty v. Emperor (1) and *Mohendra Nath Misser v. Emperor* (2) distinguished.

The omission to administer an oath to an interpreter, under s. 5 (b) of the Oaths Act (X of 1873), does not, by reason of s. 13, render the evidence of a witness whose evidence was interpreted by him inadmissible against the latter on his subsequent trial for giving false evidence. The only effect of the omission is to make it incumbent on the prosecution to prove the accuracy of the translation.

Queen v. Ramsodoy Chuckerbutty (3) approved.

THE appellant, Rakhal Chandra Laha, was tried before Mr. E. E. Forrester, Sessions Judge of Midnapore, who agreeing with the assessors found him guilty under section 193 of the Penal Code, on the 29th March 1909, and sentenced him to rigorous imprisonment for five years and to a fine of Rs. 3,000, and, in default, to a further term of rigorous imprisonment for one year and nine months.

The story of the prosecution was that the accused was employed as a police spy in Midnapore from May to September 1908, on a salary of Rs. 25 and expenses, for the purpose of obtaining information regarding a widespread conspiracy, which was believed by the authorities to exist, for the murder of officials in Midnapore and elsewhere by bombs and other violent means. He brought reports almost daily which were reduced to writing by one Asadullah, a head constable of police, and after being read over to Moulvi Mazharul Huq, the Deputy Superintendent of Police, were signed by the appellant. In consequence of the information so given by him, the houses of Santosh Chunder Das and Baroda Dutt were searched and two bombs discovered, and proceedings under the Explosive Substances Act (VI of 1908) were ultimately taken against some 27 persons.

The appellant was examined-in-chief on oath as a prosecution witness, but having turned hostile was cross-examined by the Crown, on the 4th and 5th November 1908, during the preliminary inquiry held by Mr. C. H. Reid, Joint Magistrate of

(1) (1904) I. L. R. 28 Mad. 308.

(2) (1908) 12 C. W. N. 845.

(3) (1873) 20 W. R. Cr. 19.

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Midnapore, in the case of *Emperor v. Santosh Chunder Das and Others*. At the close of his evidence the whole of his deposition was read over and translated to him by Mr. Mahendra Chandra Sen, vakil, in the presence of the Magistrate and a pleader for one of the accused, and he admitted its correctness and did not suggest any alterations. On the 23rd November, Mazharul Huq filed an application for sanction, under section 195 of the Criminal Procedure Code, before Mr. Reid setting forth *verbatim*, in 22 paragraphs, the statements alleged to be false. On the next day Mr. Reid granted sanction without, however, specifying in his order any particular statements. On the 25th instant Mazharul Huq lodged a complaint before the Additional District Magistrate putting in and referring to the application for sanction as containing the false statements alleged. The appellant was, after a preliminary inquiry, committed to the Sessions Court and tried by it on a charge which set forth *verbatim* seven specific instances of perjury divided into three sets of statements, relating (i) to the circumstances under which he became an informer, (ii) to the alleged inducements offered him by Mr. Weston, and (iii) to the manner in which exhibit 56 was prepared.

It appeared that during the inquiry before Mr. Reid in the original case Mr. Jogendra Nath Mukerjee, a vakil, acted as interpreter, with the consent of both sides, but that he interpreted the appellant's evidence without having been sworn. At the Sessions trial Mr. Mukerjee was examined for the prosecution and deposed that he had interpreted the questions put to the appellant and his answers correctly, to the best of his ability, though he admitted that he did not remember all the questions and answers, but only one or two sentences here and there. Mr. Reid was also examined, and proved that the appellant's deposition was correctly recorded by him in accordance with the translation of Mr. Mukerjee.

Babu Narendra Kumar Bose, for the appellant.

The Officiating Advocate-General (Mr. Gregory), for the Crown.

JENKINS C.J. AND MOOKERJEE J. The appellant, Rakhal Chandra Laha, has been convicted, under section 193 of the Indian Penal Code, of perjury in a judicial proceeding, and sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs. 3,000, and, in default of payment of the fine, he has been sentenced to undergo rigorous imprisonment for an additional term of one year and nine months.

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The case for the prosecution may be briefly stated. Rakhal Chandra was employed as a spy by the police at Midnapore, from May to September 1908, in order to gather information about a conspiracy believed to exist for the murder of officials by the use of explosives and otherwise. It is stated that he generally brought reports from day to day which were taken down by the head constable, Asadullah. The entries were subsequently read over to the Deputy Superintendent of Police, Moulvi Mazharul Huq, and then signed by the informer. It is alleged that on some occasions the reports were written out by the informer himself. The effect of the informations so recorded was to implicate a large number of persons in the alleged conspiracy, and on the basis thereof, proceedings were commenced under the Explosive Substances Act against twenty-seven persons. On the 4th November 1908 Rakhal was examined in the Court of the Joint Magistrate before whom these proceedings were pending. He did not depose in support of the previous statements. On the other hand, he gave a detailed account of the circumstances under which he had been compelled to act as an informer, and described minutely the inducements which, he alleged, had been held out to him by the District Magistrate, Mr. Weston. In his deposition he further stated that exhibit 56, which purports to be the record of the informations given by him to the police, was not written out from day to day, but had been prepared in one sitting and had been signed by him practically under compulsion from the police. On the 23rd November 1908 the Deputy Superintendent of Police applied to the Joint Magistrate for sanction under section 195 of the Criminal Procedure Code to prosecute Rakhal for an

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offence under section 193 of the Indian Penal Code. This application specified the statements in the deposition which were alleged to be false. On the day following, sanction was granted by the Joint Magistrate. Proceedings were then commenced in the Court of the Additional Magistrate, and, on the 9th March 1909, Rakhal was committed to take his trial in the Court of Sessions. On the 29th March the Sessions Judge, in agreement with the two assessors, found Rakhal guilty of an offence under section 193, and sentenced him as already described.

The propriety of this conviction has been challenged substantially on five grounds, namely, *first*, that the sanction, on the basis of which the proceedings were instituted, was bad, inasmuch as the alleged false statements were not specified in the sanction; *secondly*, that the charges were illegal, inasmuch as, although there were nominally three heads, there were in substance at least seven charges; *thirdly*, that the deposition containing the alleged false statements was not legally proved; *fourthly*, that the statements in question had not been proved to be false; and *fifthly*, that a proper opportunity was not afforded to the counsel for the accused either to cross-examine the witnesses or to place his case fully before the Court. It has further been argued by the learned vakil for the appellant that, if the conviction is sustained, the sentence is too severe and should be reduced.

In support of the first ground taken on behalf of the appellant it has been argued that it was obligatory upon the Joint Magistrate, who granted the sanction under section 195, to specify the statements which in his opinion were false. This contention, it is conceded, is not supported by sub-section (4) of section 195, which prescribes that "the sanction referred to in the section may be expressed in general terms and need not name the accused person; but it shall, so far as practicable, specify the Court or other place in which, and the occasion on which, the offence was committed." Reliance, however, has been placed upon a number of judicial decisions which, when examined, are found to fall into three classes. In the

first class of cases, of which the case of *Balwant Singh v. Umed Singh* (1) may be taken as the type, it was ruled that an application for sanction to prosecute for perjury ought to set out in detail the statements which are alleged to be false. In the second class of cases, of which the decisions in *Queen v. Kartick Chunder Holdar* (2), *Queen v. Gobind Chunder Ghose* (3), *Queen v. Boodhun Ahir* (4), *In re Jivan Ambaidas* (5), and *Goberdhone Chowkidar v. Habibullah* (6) may be taken as instances, it was ruled that when sanction is granted to prosecute a person for perjury, the order should set out the precise words which are false in the opinion of the authority granting the sanction. In the third class of cases, of which the case of *Queen v. Sunder Mohooree* (7) may be taken as the type, it was ruled that a charge framed for the prosecution of a person for perjury, should set out in detail the alleged false statements. The principle upon which these decisions are based appears to be that section 195 should be used in such a way as to give the person, against whom sanction is asked for, or granted, the means of knowing precisely of what the alleged criminal act consists. It is right, therefore, when sanction is sought or granted, in respect of statements contained in a long deposition, that the particular statements alleged to be false should be specified. Tested from this point of view it may be conceded that the sanction in this particular case was defective. But in answer to this argument it has been contended by the learned Advocate-General that this is not decisive of the validity of the conviction, because, under section 537 of the Criminal Procedure Code, a conviction cannot be set aside on account of a defect of this description in the sanction unless it is established that there has in fact been "a failure of justice." Two of the cases relied upon by the appellant furnish illustrations of the application of this principle: *Queen v. Kartick Chunder Holdar* (2) and *Queen v. Boodhun Ahir* (4). In the circumstances of the present

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(1) (1896) I. L. R. 18 All. 203.

(4) (1872) 17 W. R. Cr. 32.

(2) (1868) 9 W. R. Cr. 58.

(5) (1894) I. L. R. 19 Bom. 362.

(3) (1868) 10 W. R. Cr. 41.

(6) (1897) 3 C. W. N. 35.

(7) (1868) 9 W. R. Cr. 25.

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case, then, can it be seriously contended that the accused has been unfairly affected as to his defence on the merits by reason of any defect in the sanction? Clearly the answer must be in the negative. The statements which are alleged to be false were set out in full detail in the application on the basis of which the sanction was granted. They were also specified in the charge which was subsequently framed. There is no reason to suppose, therefore, that the accused had not full opportunity of knowing what were the specific statements made by him which were alleged by the prosecution to be false. The first ground taken on behalf of the appellant cannot, therefore, be supported.

In support of the second ground it has been argued that the charge was multifarious, for, although there were three sets of statements mentioned in the charge, they may be analysed into at least seven distinct statements, each of which is practically alleged to be false. It has, in substance, been argued by the learned vakil for the appellant that the form in which the charge was drawn up was an evasion of the provisions of section 234 of the Criminal Procedure Code, and that a separate charge ought to have been drawn up in respect of every single utterance of the accused which was alleged to be false. In our opinion this contention is clearly unfounded. The view we take is supported by the decision of the Madras High Court, in *H. C. Pro.*, 1st May 1871 (1). It was there ruled that the making of any number of false statements in the same deposition is one aggregate case of giving false evidence, and that charges of false evidence cannot be multiplied according to the number of false statements contained in the deposition. In that case the person who had given false evidence was sought to be prosecuted and punished separately for two statements made in the course of the same deposition; this was not allowed, and it was held that "tested by the law of evidence, the whole deposition must be looked at and one part qualified by the other." Moreover, there can be no doubt that the three statements which have been

selected from the deposition of the appellant in the present case, and which are alleged to be false, related to incidents closely connected with one another, and that they could not properly be analysed so as to expand the charge into seven distinct charges against the accused. The second ground, therefore, cannot be supported.

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In support of the third contention of the appellant it has been argued that, as the provisions of section 360, sub-section (1), of the Criminal Procedure Code, were not complied with, when the original deposition was recorded, the deposition cannot be legally received in evidence. Section 360, sub-section (1), provides that "as the evidence of each witness taken under section 356 or section 357 is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be corrected." It is pointed out that at the original trial there were twenty-seven accused persons, that the deposition of Rakhai appears to have been read over to him in the presence of the pleader of one of the accused persons, and that there is no evidence to show that the pleaders for any of the other accused persons were present when the deposition was so read over. On this basis it is contended that section 360 was contravened, and that, therefore, on the authority of the cases of *Kamatchinathan Chetty v. Emperor* (1) and *Mohendra Nath Misser v. Emperor* (2), the deposition cannot be received in evidence. The cases relied upon, however, are clearly distinguishable. In each of those cases, there was only one accused person, and the deposition of the witness appears to have been read over by the Court-clerk at a place where neither the Judge nor the vakil for the accused was present. In the case before us, so far at least as one of the original accused persons was concerned, the deposition was read over in the presence of his pleader, and was undoubtedly admissible in evidence as against that accused. In our opinion it is immaterial for the purposes of the present prosecution that it is not proved that the deposition was read

(1) (1904) I. L. R. 28 Mad. 308.

(2) (1908) 12 C. W. N. 845.

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over to the witness in the presence of the other accused persons as well as of their pleaders. The third ground taken on behalf of the appellant must, therefore, fail.

In support of the fourth ground it has been pointed out that the evidence given by Rakhal was interpreted by a gentleman who was not put on his oath. It appears from the record that the deposition of Rakhal was interpreted by Mr. Jogendra Nath Mukerjee, one of the vakils of this Court, and apparently the provisions of section 5, sub-section (b), of the Indian Oaths Act, were not followed. The provisions of section 13 of the Indian Oaths Act, however, furnish a complete answer to the argument of the appellant. That section provides that "no omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever, in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth." We were invited by the learned vakil for the appellant to put a narrow construction upon this section, and to hold that the effect of the concluding words of the section is to restrict its application to the case of witnesses only. A plain reading of the section, however, negatives the suggested interpretation. It is clear from the language used by the Legislature that the omission to take any oath, as prescribed by the Act, does not render inadmissible any evidence whatever in respect of which such omission took place, and this omissions to take the oath may happen not only on the part of a witness but also on the part of the interpreter of the question put to and evidence given by the witness. It may be observed that a wider construction than the one suggested on behalf of the appellant was put upon the section, so far back as 1873, by one of the learned Judges who decided the case of *Queen v. Ramsodoy Chuckerbutty* (1), when he held that section 13 was applicable in the case of Jurors. In our opinion the only effect of the

(1) (1873) 20 W. R. Cr. 12.

omission of the interpreter to take the oath was to render it necessary for the prosecution to prove that the interpretation was made accurately. This has been done inasmuch as Mr. Mukerjee has been called : he has deposed that he rendered the statements made by Rakhal quite accurately, and in this he is supported by Mr. Reid. It is clear, therefore, that the deposition must be taken to contain an accurate record of the statements actually made by Rakhal Chandra. The question, therefore, arises whether the statements as specified in the charge are false within the meaning of section 193 of the Indian Penal Code. The whole of the evidence on the record has been placed before us and discussed at considerable length, and in our opinion there can be no reasonable doubt that the statements in question are false. As regards the first set of statements, which relate to the circumstances under which Rakhal became an informer, it is clear from the evidence of the Moulvi, as also of Asadullah, that the statements are untrue. It may further be observed that the story that Rakhal now gives is an extremely improbable one. There can be no conceivable reason why of all persons at Midnapore taken to the police, while drunk, he should be selected as the most appropriate one to act as an informer. In respect of the second set of statements, which relate to the inducements said to have been held out by Mr. Weston, we have the evidence of Mr. Weston as also of the Moulvi : and, in our opinion, there is no reason why this testimony should not be accepted. It was faintly suggested on behalf of the appellant that the informer may not have understood Mr. Weston correctly, or that the Moulvi in interpreting to him what Mr. Weston said may have exaggerated, and may thus have led him to believe a great deal more than what Mr. Weston actually said. No foundation, however, for such a case was laid in the Court below, and the contention which has been advanced in this Court is nothing more than a mere suggestion unsupported by the evidence. As regards the third set of statements, regarding the preparation of exhibit 56, the case may not be quite so clear. But we have the evidence of the Moulvi and of Asadullah that, as the

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informer made statements from day to day, they were taken down by Asadullah, read over to the Moulvi, and signed by the informer. Taking the three sets of statements as a whole, therefore, there is no room for reasonable doubt that the evidence given by Rakhal Chandra in the Court of the Joint Magistrate was false in material particulars, and that he is guilty of an offence under section 193 of the Indian Penal Code.

The fifth ground taken on behalf of the appellant is to the effect that sufficient opportunity was not given to the counsel in the Court below to cross-examine the witnesses or to address the Court. This allegation has not been made out, and, in fact, this part of the case was lightly passed over by the learned vakil for the appellant.

It is clear, therefore, that the five grounds upon which the conviction is assailed must fail, and the conviction must be affirmed. There remains only the question of sentence, which no doubt is severe. The learned Sessions Judge sentenced the accused to pay a fine of Rs. 3,000 on the ground that he had committed perjury because he had been bribed. The record, however, does not support this view of the case. No doubt, it is not explained under what circumstances exhibit G, which was prepared by the police to enable Rakhal to refresh his memory while in the witness box, found its way into the hands of the legal advisers of the accused in the original trial. At the same time there is not a tittle of evidence to show that Rakhal has received any bribe. The sentence of fine, therefore, must be set aside. So far as the sentence of imprisonment is concerned, it is in our opinion also unduly severe. At the same time it must be remembered that the offence of which the accused has been proved guilty is a serious one, and in the interests of justice a substantial term of imprisonment is necessary. We, therefore, reduce the term of imprisonment from five years to three years and six months.

The result, therefore, is that the conviction is affirmed, and the appellant is directed to be rigorously imprisoned for three years and six months. The fine, if paid, will be refunded.

E. H. M.

Conviction affirmed.

CIVIL RULE.

Before Mr. Justice Stephen and Mr. Justice Vincent.

VELAYAT HOSSEIN

v.

BENGAL AND NORTH-WESTERN RAILWAY Co.*

1909

June 8.

Railway Company, liability of—Passengers' Luggage—Merchandise booked as "Luggage," loss of—Railways Act (IX of 1890) ss. 47, 72—General Rules of Railway Companies—Damages, suit for.

A passenger took a journey on a railway and booked as his "luggage" a package containing merchandise. The package was lost and consequently not delivered at the end of his journey. He, thereupon, sued the Railway Company for damages caused by its loss :—

Held, that the case was governed by s. 72 of the Indian Railways Act (IX of 1890) and the sections of the Contract Act referred to therein ; and that the Railway Company was liable for the loss of the package.

RULE granted to the plaintiff, Velayat Hossein, the petitioner.

On the 15th June 1908, the plaintiff, a trader in *durries* or carpets purchased two third-class tickets for a journey on the Bengal and North-Western Railway and booked as his "luggage" a package containing 96 pieces of *durries* or carpets, for which he obtained a certain free allowance under his said two tickets, and paid a certain sum of money for excess weight not covered by the free allowance. At his destination the said package was found missing, and delivery of the same was not consequently made to the plaintiff who instituted a suit in the Court of Small Causes at Patna, against the Bengal and North-Western Railway Company for the sum of Rs. 332 being the price of the said *durries*.

The defence was, that the plaintiff sent the goods at his own risk, and that the Railway Company was not liable for the loss of the same under rule No. 76 of the Company's

* Civil Rule No. 1271 of 1909, against the decree of Umesh Chandra Sen, Subordinate Judge of Patna, dated Jan. 15, 1909.

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General Rules. [Rule No. 76 will be found in their Lordships' judgment.]

The Subordinate Judge, exercising Small Cause Court jurisdiction, dismissed the suit concluding as follows :—

"Rule 76 (of the Railway Company), I think, applies to this case, and that these articles were despatched at his (plaintiff's) own risk. The defendants cannot, therefore, be held liable. I dismiss the case, but won't grant the defendants' costs."

The plaintiff, thereupon, moved the High Court and obtained this Rule on the defendant Company to show cause why the judgment and decree of the Subordinate Judge should not be set aside.

Babu Naresk Chandra Sinha, for the petitioner. The responsibility of Railway Companies in carrying goods is that of a bailee, and they cannot vary or limit this responsibility without complying with the provisions of section 72 of the Railways Act (IX of 1890), wherein the responsibility of Railway Companies is clearly set out : *Sesham Patter v. Moss* (1), *Wilkinson v. The Lancashire and Yorkshire Railway Co.* (2) affirmed on appeal (3). Any rule made by a Railway Company must be consistent with the Act and reasonable : *Jalim Singh Kotary v. Secretary of State for India* (4). I submit that rule No. 76 of the Company's General Rules is inconsistent with the Act, and the Bengal and North-Western Railway Company cannot shirk their responsibility under the Railways Act by taking advantage of their own rules. Railway Companies, as bailees, have the *onus* on them to show that they have taken reasonable and ordinary care : *Trustees of the Harbour, Madras, v. Best & Co.* (5) and *Raisett Chandmull Hamirmull v. Great Indian Peninsula Railway Co.* (6).

Babu Joy Gopal Ghose (*Mr. McNair* with him), for the Railway Company. The question is whether the petitioner is entitled to consider the package of *durries* or carpets as "luggage." I submit he is not so entitled. The term "luggage"

(1) (1894) I. L. R. 17 Mad. 445.

(2) [1906] 2 K. B. 619.

(3) [1907] 2 K. B. 222.

(4) (1904) I. L. R. 31 Calc. 951.

(5) (1899) I. L. R. 22 Mad. 524.

(6) (1893) I. L. R. 17 Bom. 723.

is distinguishable from the term "merchandise" and he cannot treat merchandise as luggage: *Hudston v. Midland Railway Co.* (1), *Cahill v. The London and North-Western Railway Co.* (2), *Great Northern Railway Co. v. Shepherd* (3), *Belfast and Ballymena, &c., Railway Cos. v. Keys* (4). The plaintiff has taken advantage of his own wrong in claiming damages for loss of articles other than "luggage," viz., merchandise. If he books merchandise as "luggage," he has to suffer the loss, if any, of his merchandise. Section 72 of the Railways Act contains the words "subject to the other provisions of this Act," and includes section 47 and rules framed thereunder, and all provisions as to "risk notes." The rules framed by the Bengal and North-Western Railway Company under section 47 are not inconsistent with the Act and, therefore, not *ultra vires*; and the Railway Company is not liable in damages for the loss of the package. There is no authority on this point, and the cases cited on behalf of the petitioner do not bear on the present case.

Babu Naresch Chandra Sinha, in reply.

Cur. adv. vult.

STEPHEN AND VINCENT JJ. This is a Rule on the Bengal and North-Western Railway Company to show cause why a judgment and decree of the Subordinate Judge of Patna should not be set aside under the following circumstances. The petitioner took a journey on the Bengal and North-Western Railway for which he took two third-class railway tickets. At the same time he delivered a package to the servants of the Railway Company to be taken as passenger's luggage and paid a certain sum as extra charges in respect of the excess weight of the package beyond what was allowed free of charge. The package contained merchandise which it is not suggested could be considered as luggage. It was not delivered to the petitioner at the end of his journey, and he sued before the Subordinate Judge acting in his Small Cause Court jurisdiction,

(1) (1869) L. R. 4 Q. B. 366.

(2) (1863) 13 Scott N. S. 818.

(3) (1852) 8 Exch. 30.

(4) (1861) 9 H. L. Cas. 556.

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for damages caused by its loss. The Judge dismissed the suit holding that the case was governed by rule No. 76 of the Company's General Rules. This is as follows :—"The term 'luggage' will include only wearing apparel and effects required for the personal use of passengers. Persons tendering amongst their luggage articles not properly classifiable as such do so at their own risk." The petitioner contends that this rule does not absolve the Railway Company from their liabilities under the Indian Railways Act of 1890. Section 72 of that Act provides that "(1) the responsibility of a Railway Administration for the loss of goods delivered to the Administration to be carried by Railway shall, subject to the other provisions of this Act, be that of a bailee under sections 151, 152 and 161" of the Contract Act. The second sub-section provides that an agreement purporting to limit that responsibility is void, unless it is in writing signed by the person sending or delivering the goods, and is in a form approved by the Government of India. The third sub-section enacts that "nothing in the common law of England or in the Carriers Act, 1865, regarding the responsibility of common carriers with respect to the carriage of animals or goods, shall affect the responsibility, as in this section defined, of a Railway Administration."

If by force of the above enactment the above-mentioned provisions of the Contract Act apply to this case, the liability of the defendants in the suit cannot be questioned. But section 72 of the Railway Act is "subject to the other provisions of this Act": and it is contended on behalf of the Railway Company that the section is accordingly subject to a rule duly made under section 47 of the Railways Act, as it is not denied that rule No. 76 was made. By para. (2) of this section the Company can make a rule "consistent with this Act" for the purpose of "regulating the carriage of" passenger's "luggage." Does this rule absolve the Company from liability under section 72? The question seems to us to admit of no answer but an unhesitating negative. A very definite enactment would be necessary to give the Company power to repeal a provision of the Act, particularly so

general a one as that contained in section 72, by a rule ; and in this case the rule has to be "consistent" with the Act, an expression which is singularly inapplicable to a rule that repeals a part of it. Then it does not appear that the words in section 72, whereby its operation is made "subject to the other provisions of this Act," apply at all to rules under section 47. A rule made under the Act is not a provision of the Act, and the words have an obvious reference to section 73 relating to the carriage of animals, and section 75, relating to the carriage of articles of special value, which are expressly framed to place certain restrictions on the full operation of section 74. Moreover, the provisions of sub-section (2) of section 72 have not been complied with in this case.

A variety of English cases have been referred to, according to which it is contended that the defendants cannot be fixed with liability in this case ; but all such cases have been decided on a consideration of the position of the Railways as carriers or under Acts that do not apply here. The law here has been carefully simplified by the exclusion of the operation of the common law as to carriers and the Carriers Act, 1865, from cases of loss of goods, and this case is consequently governed by section 72 of the Railways Act and the section of the Contract Act there referred to, and by them alone.

This Rule is accordingly made absolute, the decree of the lower Court is set aside. We have no evidence before us on which to assess the damage caused to the petitioner by the loss of his goods. We, therefore, remit this case to the Subordinate Judge to be re-tried by him in accordance with the law that we have laid down.

The petitioner is entitled to his costs on this Rule.

O. M.

Rule absolute.

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APPELLATE CIVIL.

Before Mr. Justice Chitty and Mr. Justice Carnduff.

NARENDRA NATH BAIRAGI

v.

DINA NATH DAS.*

1909

June 18

Hindu Law—Adoption by Hindu Woman—Prostitute, adoption by—Inheritance, right of—Letters of Administration.

A Hindu woman cannot under any circumstances adopt a son to herself, nor can any so-called adoption confer a right of inheritance on the adopted son.

APPEAL by the petitioner, Narendra Nath Bairagi.

The appellant, Narendra Nath Bairagi, applied to the District Judge of the 24-Parganas for the revocation of the letters of administration to the estate of Ramani Debi, alleged to be a prostitute, on the ground that he was adopted by the said Ramani Debi, and that Dina Nath Das, her husband's brother's son, to whom the letters of administration were granted, had not served him with a special citation and was not entitled to the said letters of administration.

The learned District Judge held that an adoption of a son by a Hindu woman to herself was nowhere recognised as creating any status, except in Mithila and then only when the adoption was in *kririma* form; that it was illegal in Bengal; and that the petitioner was not entitled, even if he proved the adoption, to apply for the revocation of the letters of administration.

Against this decision Narendra Nath Bairagi appealed to the High Court.

Mr. J. Chatterjee (Babu Biswanath Bose with him), for the appellant. Adoption by a prostitute of a daughter is recognised in Madras and Western India; it is not recognised in Bengal because it is opposed to public policy: but no such

* Appeal from Original Decree, No. 434 of 1907, against the decree of C. P. Beachcroft, District Judge of 24-Parganas, dated July 17, 1907.

consideration would underlie the adoption of a son by a woman of that class, and therefore the adoption by Ramani Debi of the appellant was valid and gave him all the rights of a natural-born son.

Babu Mohendra Nath Roy (Babu Surendra Nath Ghosal with him), for the respondent. A Hindu woman can under no circumstances adopt a son to herself: Mayne's Hindu Law, 7th edition, page 263; Golap Chandra Shastri's Hindu Law, 3rd edition, page 129.

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CHITTY AND CARNDUFF JJ. On 5th January 1907, the respondent, Dina Nath Das, obtained letters of administration to the estate and effects of one Ramani Debi, widow of Chintamani Bairagi. On 6th March 1907, the appellant Narendra Nath Bairagi applied to the District Judge of the 24-Parganas for revocation of the letters of administration on the ground that the said Ramani Debi was a prostitute, and that he was her adopted son and heir, and so entitled to administer her estate in preference to Dina Nath Das, who claimed to be her husband's brother's son. The appellant further objected that he should have, but had not been, cited at the time the letters of administration were granted to Dina Nath Das. The District Judge has rejected the appellant's application on several grounds. He found that appellant's alleged adoption had not been proved; that it was not proved that Ramani Debi was a prostitute; that, even if proved, the kind of adoption set up by the appellant would give him no right of inheritance. He further found that appellant was aware of the application by Dina Nath Das for letters of administration.

Narendra Nath Bairagi has appealed. It is obvious that unless he can show that he was so adopted by the deceased as to give him a right of inheritance to her property he is in the position of a mere stranger, and has no *locus standi* in the administration proceedings. This point was argued before us by the counsel for the appellant. He maintained that Ramani Debi was a prostitute; that the adoption of daughters by women of her class is recognised in Madras and Western India; that

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it is only not recognised in Bengal because it is considered to be opposed to public policy; that no such consideration would underlie the adoption of a son by a woman of that class; and that, therefore, his client's adoption was a good adoption giving him all the rights of a natural-born son.

Assuming for the purposes of argument that Ramani Debi was a prostitute, no authority was cited to us either from texts, or text-books, or decided cases for the proposition that a Hindu woman can under any circumstances adopt a son to herself. On the other hand, the contrary is clearly stated: see Mayne's Hindu Law, page 263; Shastri, page 129. The learned counsel admitted that he had no authority for this proposition, but asked us to decide in appellant's favour on "general principles." We have no intention, even if we had the power, of creating a new rule of Hindu Law for the appellant's benefit. It is manifest that Ramani Debi had no power to adopt, if she did adopt, the appellant as a son to herself, nor could any so-called adoption confer on him a right of inheritance. It follows that he has no *locus standi* in this case, and it is unnecessary to go into the other questions, mainly of fact, which are raised on this appeal. The appeal is dismissed with costs.

Appeal dismissed.

S. A. A. A.

CRIMINAL REVISION.

Before Mr. Justice Caspersz and Mr. Justice Ryves.

RAM KHELAWAN SINGH

v.

EMPEROR.*

1909

March 10.

Rioting—Right of Private Defence—Protection of Zemindar's right to Property—Excessive hurt by one member of an unlawful assembly—Criminal liability of the other members thereof—Penal Code (Act XLV of 1860) ss. 147, 324.

Where the tenants were found to have held their lands on the *batai* system, under which harvested crops should be taken to the village *khali*han, but it appeared that they went in a large body armed with *lathis* with the avowed intention of removing them to their own houses, and were making up the crops already cut into bundles, whereupon the zemindars' watchmen remonstrated and a number of their *amlas* went to the spot armed with *lathis* and swords and a fight took place, owing to the interference of the leader of the tenants, in the course of which some of the tenants received slight incised wounds and one of them a severe one inflicted by one of the accused, and where it further appeared that the zemindars' people had, four days before the date of the occurrence, sent an urgent appeal to the police for protection against a serious breach of the peace which seemed imminent :—

Held, that, inasmuch as the common object of the accused was to protect the zemindars' rights over the crops, and there was no specific finding by the Sessions Judge that their intention was to use more force than was necessary or that they had in fact used excessive force, they acted in the exercise of the right of private defence and were not guilty of rioting.

Held, also, that, as there was nothing to show that the grievous hurt caused by one of the accused was not his own individual act, the others were not guilty under ss. 324 of the Penal Code.

Each case of this kind must be decided on its own particular facts.

Baijnath Dhanuk v. Emperor (1) distinguished.

THE appellants and 12 others were convicted, on the 23rd December 1908, by the Sub-divisional Officer of Barh, variously, under sections 147, 148, 324 and 326 of the Penal Code, and sentenced to different terms of imprisonment, some

* Criminal Revision No. 75 of 1909, against the order of C. W. E. Pittar, Sessions Judge of Patna, dated Jan. 13, 1909.

(1) (1908) I. L. R. 36 Calc. 296.

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being also sentenced to fines, and were further bound down under section 106 of the Criminal Procedure Code for one year. On appeal the Sessions Judge of Patna by his order, dated the 13th January 1909, acquitted 12 of the accused, and convicted four under section 147 and four under section 148 of the Penal Code, setting aside the fines and the order under section 106.

It appeared that there was a dispute between the landlords and the tenants as to the nature of their tenancy, the former asserting that it was *bhaoli* and the latter that it was *nugdee*. Both Courts found that the tenants held their lands *bhaoli* on the *batai* system under which the crops when cut should have been taken to the village *khalihan* and the shares of each party there distributed. The time for harvesting had arrived, and the tenants openly expressed their intention to remove the crops to their own villages. In consequence of an apprehended disturbance, the appellant, Bhim Lall, as head *punch* of the circle, sent a letter, on the 16th September 1908, to the police informing them of the dispute and the likelihood of a serious breach of the peace from the attempt on the part of the tenants to assert their claim of *nugdee* tenure and to reap the crops, and of the opposition that would be offered by the zemindars' *amlas*, two of whom were named and were among the appellants. Some watchmen were placed on the fields to guard the crops on behalf of the zemindars. On the 20th of September, before the police could send assistance, the tenants, forty or fifty in number and armed with *lathis*, proceeded to the lands and began collecting the crops which had been cut before in bundles. The watchmen remonstrated, and the accused arrived on the scene armed with *lathis* and swords. For a time a breach of the peace was averted, but, owing to the aggressive attitude of one Shyama Mahton, the "champion" of the tenants, a fight took place. Some of the tenants received slight sword cuts, but Shyama was severely injured by one Peari who had since died.

The common object set out in the charge was "to prevent Shyama Mahton and the other tenants of Kazichuk from cutting and harvesting the *makai* crop in their fields, and

also to assault the tenants for having cut the same, notwithstanding the protests of the zemindars' servants."

The Sessions Judge found that it could not have been the object of the accused to prevent the cutting of the crops or to punish the tenants for having done so, but that the intention was to prevent them from carrying off the *makai* in order to protect the zemindars' rights. He held that the landlords had an undoubted right to prevent the removal of the crops and their disposal in such a manner that no division could take place, a course which would have entailed serious loss on them and involved them in unnecessary litigation, but that the question was how far they were justified in sending a body of men to prevent the threatened invasion of their rights, and that, if the accused went with the intent of using criminal force more than was necessary, they would be guilty of being an unlawful assembly. He found that they were not justified in forming an unlawful assembly to enforce their right by means of criminal force, and that they were aware that there was a probability of causing greater harm than was necessary for avoiding any harm to the property in dispute.

Mr. Ali Imam (*Mr. Hug* and *Syed Endayet Karim* with him), for the petitioners, argued mainly that upon the findings of the Sessions Judge the right of private defence was established.

No one showed cause.

CASPERSZ AND RYVES JJ. This Rule was issued on the District Magistrate of Patna to show cause why the conviction and sentences passed on the petitioners should not be set aside on the ground that they (the zemindars' people) were acting in the exercise of their right *bonâ fide* in preventing the tenants from harvesting the crops in any place other than the village *khaliha*.

We have heard learned counsel in support of the Rule, and perused the judgments of the lower Courts. Twenty persons were originally charged, variously, under sections 147 and 148, and under sections 324 and $\frac{326}{149}$ of the Indian Penal

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Code, and convicted and sentenced to various terms of imprisonment. Some of them were also ordered to pay fines, and all of them were bound down under section 106 of the Criminal Procedure Code to keep the peace for one year.

On appeal, the learned Sessions Judge acquitted twelve and convicted eight persons. Of these, four were convicted under section 148 of the Indian Penal Code and the remaining four under section 147. The rest were acquitted, the fines were remitted, and the order under section 106 was discharged. These eight persons whose convictions were upheld obtained the Rule set out in the beginning of this judgment.

The common object of the rioters, as charged, was (i) to prevent by force, or show of force, the tenants from cutting the crops, and (ii) to assault them by way of punishment for having cut the crops.

The facts of the case, as found by the learned Sessions Judge, are as follows. For a considerable time past there has been a dispute between the tenants and the zemindars as to the nature of their tenancy, the tenants asserting that their tenancy was *nugdee*, whereas the zemindars asserted that it was *bhaoli*. The time for harvesting the crops had arrived, and the tenants had openly expressed their intention of cutting the crops and carrying them away to their houses. The friction between the parties had become so acute that two watchmen were placed on guard on behalf of the zemindars, and an urgent appeal was made to the police authorities for protection as a serious breach of the peace seemed imminent. This happened on the 16th September 1908. The occurrence, with which we are concerned, took place four days subsequently, that is, on the 20th September. In the meantime, it appears that some of the crops had been cut and left on the field. It has been found by both the Courts that the tenants held their land on the *batai* system. The crops, therefore, when cut, should have been taken to the village *khalihan*. On the morning of the 20th September, it has been found that, a large number of tenants armed with *lathis* went to the field with the avowed intention of carrying away the crops, which

had already been cut, to their own houses, and actually began making bundles of the harvested *makai*. The watchmen who had been placed there protested, and a number of the *amlas* of the zemindars came to the spot, armed, some with *lathis* and, it is said, six of them with swords. Their common intention, it is found, was to protect the zemindars' property. For a time, apparently, they were successful in preventing a breach of the peace, until one Shyama Mahton, who is described in the lower Court's judgment as "the champion of the tenants," interfered. According to the first informations given by one of the tenants himself, the tenants insisted on their right to "take away the crops, and began making them up into bundles when the zemindars' people prevented them." Thereupon a fight took place, and persons on both sides were injured. Some of the tenants had incised wounds, though, with the exception of Shyama Mahton, not of a severe character, which makes it more probable that some of the zemindars' *amlas* had swords and used them. The only severe injury to Shyama Mahton was inflicted by one Peari who has since died.

The learned Sessions Judge has found that the common object in the charge, on which the accused were tried, has not only *not* been proved, but it could not have been their object. The common object which he has found, although the accused were not charged with it, was to prevent the tenants from carrying away the crops. He has found that the tenants were the aggressors in the fight, that they had no right to take the crops to their own houses, and that both the watchmen were wounded in the fight. He goes on to say:—"Up to a limit they (the zemindars) had, no doubt, a right to prevent the harvesting in the manner intended by the tenants. But under the criminal law they were not justified in forming an assembly for enforcing that right by means of criminal force." Earlier in his judgment, after referring to section 81 of the Indian Penal Code, he held:—"Now in the present case, the landlords had an undoubted right to prevent their crops being so disposed of that no division could take place, which would have

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entailed serious loss to them and would have involved them in unnecessary litigation. The question is how far they were justified in sending a body of men to prevent the threatened invasion of their rights. If the assembly went with the intention of using criminal force more than was necessary to prevent that, the members would be guilty of forming an unlawful assembly."

There is no finding in the judgment, however, that the intention of this assembly was to use more force than was necessary, nor is there any finding that they, in fact, did use more force than was necessary, though this may be inferred from the Judge's order convicting the petitioners. There is nothing to indicate that the common object of the assembly was to do anything more than protect their masters' property. We do not think that in protecting their masters' property they were not justified in using such force as was necessary to prevent the tenants from carrying away the crops. The only severe injury that was inflicted by them appears to have been caused, as we have said, by Peari who has died. It may be that Peari used more force than was necessary, but there is nothing to show that it was not an individual act of his, or that the assembly, which in its inception was not unlawful, became an unlawful assembly subsequently.

Each case of this kind must be decided on its own particular facts. The facts in this case are distinguishable from those in the case of *Baijnath Dhanuk v. Emperor* (1).

We think that in this case, on the findings arrived at by the learned Sessions Judge himself, the Rule must be made absolute. We, therefore, acquit the accused and discharge them from their bail.

E. H. M.

Rule absolute.

PRIVY COUNCIL.

JAGARNATH PERSHAD

v.

HANUMAN PERSHAD.

P.C.*
1909March 10, 11.
May 11.

[On Appeal from the High Court at Fort William in Bengal.]

Appellate Court—Taking additional Evidence on Appeal—Civil Procedure Code (Act XIV of 1882) s. 568—Witnesses—Application for Probate—Examination of only some of Witnesses in support of Will—Tender of others for Cross-examination—Courts differing on question of fact on different Evidence—Presumption of Correctness of Appellate Court.

On an application to a District Judge for probate of a will, the evidence of three out of the six witnesses in support of it was taken, and then the applicant and two other witnesses were tendered for cross-examination, and the caveators, on the ground that such a course was not in accordance with the practice of the Civil Courts, declined to cross-examine them and their evidence was not given. The District Judge came to the conclusion on the evidence that the will was genuine and granted probate of it. On appeal the High Court, the parties consenting, took the additional evidence of the three witnesses under s. 568 of the Civil Procedure Code, and on a consideration of the whole of the evidence came to an opposite conclusion from that of the District Judge and dismissed the application for probate :—

Held, that on a pure question of fact, the Courts having differed on what were not the same materials for decision, the Judicial Committee would not reverse the decree of the High Court unless they were satisfied it was wrong, and they were not so satisfied.

An objection by the appellants that in taking additional evidence the High Court had not acted in accordance with the provisions of s. 568 of the Code of Civil Procedure, was disallowed as the appellants had, without raising any objection at the time, consented to the additional evidence being taken.

APPEAL from a judgment and decree (3rd March 1904) of the High Court at Calcutta which reversed a judgment and decree (6th August 1901) of the Court of the District Judge of Gaya.

The petitioner for probate was the appellant to His Majesty in Council.

* *Present* : LORD ATKINSON, LORD COLLINS, LORD SHAW, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

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The principal question raised on this appeal related to the genuineness of a will, dated 21st December 1900, purporting to have been executed by one Chhote Narayan Pershad.

The testator died on the morning of 22nd December 1900 leaving a widow, the respondent Manna Koer, and a daughter Lakshmi Koer. He was the adopted son of Jokhi Lal; after whose death one of his widows, the respondent Janki Koer, adopted the respondent Hanuman Pershad. Jagarnath Pershad was the natural brother of Chhote Narayan Pershad, both being sons of Ram Rekha Lal.

By the will the testator bequeathed his moveable property and cash to his wife for life with remainder to his daughter. To his wife he also bequeathed an annuity of Rs. 200 per mensem and to his daughter a house and a village and the sum of Rs. 10,000 for the expenses of her marriage. His natural brother, the appellant, was appointed executor and residuary legatee.

On 2nd January 1901, the appellant applied to the Court of the District Judge of Gaya for probate of the will. Caveats were lodged by Hanuman Pershad, Janki Koer and Manna Koer, the respondents, and later they filed written statements. Manna Koer stated that her husband died of plague, and was almost unconscious and not in a fit state of mind to execute a will on 21st December 1900. The other respondents also asserted that the testator was unconscious at the time the will was said to have been executed.

The circumstances under which the will was made were that instructions to draft the will were given by the testator on the afternoon of the 20th December, 1900, to Mr. Abdul Halim, who deposed to his being obliged to further instruct a pleader, Moti Lal Das, to prepare the draft. The pleader gave evidence as to the preparation of the draft-will that same night and giving it to Gur Sahai, the testator's clerk. This man after seeing and consulting the testator made a fair copy of it on the 21st December, and that same afternoon it was duly executed in the presence of the following witnesses: Ram Pertab Misra, Mahadeo Pandey, Rung Lal Pundit, Radha

Kishen and Bodh Singh. Of these persons Mahadeo Pandey, Rang Lal Pundit and Bodh Singh were examined as witnesses, and the appellant tendered himself, Ram Pertab Misra, and Radha Kishen for cross-examination: an objection was taken to this procedure as being not warranted by law; the objection was overruled, but the caveators declined to cross-examine the witnesses.

On behalf of the caveators Manna Koer was examined on commission, and other witnesses were examined as well as Manna Koer to show that Chhote Narayan Pershad was ill for several days before his death, that he died of plague, and that he was unconscious on the day on which he was said to have executed a will.

In support of the caveators' case three letters, marked as exhibits F, G, and H, from the father of the deceased to the brother of his widow, which purported to bear the initials of Jagarnath Pershad, the appellant, in English, were put in.

The District Judge, after a careful examination of the evidence, and giving due consideration to the position of the witnesses who deposed to the genuineness of the will, believed their evidence, and concluded his judgment by saying:—

“It appears to me on the whole that the testimony to the genuineness of the will and the competency and *animus testandi* of the testator is overwhelming, and that the evidence by which it is attempted to be rebutted is altogether untrustworthy. I therefore admit the will to probate.”

Two appeals were preferred from that decision to the High Court and were partly heard together on 28th January 1904 by GURUDAS BANERJEE and BRETT JJ., who made the following order:—

“After we had heard the learned vakil for the appellants in these two cases up to certain points, it appeared to us, subject to what the other side might have to say on the point, that it was desirable that the three witnesses Radha Kishen, Ram Pertap Misser, and Jagarnath Pershad, the applicant for probate, who had been, as order No. 26 of the 26th June 1901 shows, tendered for cross-examination, but not examined at all, should be examined as witnesses in accordance with the provisions of section 568, clause (b) of the Code of Civil Procedure, to enable this Court to decide these appeals satisfactorily; and we accordingly asked the learned gentlemen on both sides before proceeding further, to say what they had to say with reference to our taking that course. The learned vakil for the appellants said, he had no objection to

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those witnesses being examined, and he only suggested that they should be examined in this Court. The learned gentlemen on the other side said they did not object to the course suggested."

The evidence of those witnesses was taken on 23rd February 1904 when the High Court also admitted in evidence certain alleged extracts from books of account kept by the testator.

The appeals were heard on 3rd March 1904, and owing to the retirement of BANERJEE J., by a Bench differently constituted (BRETT and SARADA CHARAN MITRA JJ.) who after stating the facts continued:—

"These appeals first came on for hearing on the 28th January 1904 before a Bench of which one of us was a member, and the attention of the Court was drawn to the fact that the applicant and the two witnesses to the alleged will, Babu Radha Kishen and Ram Pertap, had not been examined before the District Judge, and as it was in the opinion of the Court desirable that the evidence of those three persons should be taken, the hearing of the appeal was adjourned for their attendance. The mere fact that they were tendered for cross-examination would not entitle the applicant to contend that their evidence supported his case and as they were material witnesses they should have been examined. They have now attended and have been examined before us and the appeals have been argued in full."

After discussing the whole of the evidence at some length, the judgment concluded as follows:—

"The will itself in appearance is not beyond suspicion. The signatures of the testator and the witnesses do not bear the appearance of being written at the same time with the same pen and ink as alleged. The District Judge appears to accept as indicative of the genuineness of the will, the fact that four of the witnesses were the same as attested the admittedly genuine document, Ex. D, executed by Chhote Narayan. We cannot agree with him. All of the witnesses but one to the present document arrived by chance at the time it was being executed and the coincidence which the District Judge notices is so remarkable as rather to raise a strong suspicion against the will. The terms of the alleged will are also inconsistent and difficult to understand. Babu Moti Lal Das says it is the first deed which he had ever drafted for Babu Chhote Narayan. It is remarkable also that it should contain the statement by the testator that there had been no misunderstanding between him and his father and brother on any matter. If true, the statement was unnecessary. On the other evidence in the case, however, its truth appears to us doubtful.

"After a careful consideration of the evidence adduced to support the will, we are unable therefore to regard it as trustworthy or as proving the due execution of the will by Babu Chhote Narayan Pershad. It is not impossible that the deceased may have formed the intention of disposing of his property by a will, but we are not satisfied that his intention are embodied in the document Ex. I, or that the document was executed by him or that he was in fit condition of mind or body to execute a will at the time the document

produced is said to have been executed. We are unable to agree with the learned counsel for the respondent that the cash book including the entries Exs. M. N. O. was not properly proved. It was proved by Jagarnath to be the cash book of Babu Chhote Narayan, and the entries were proved by Ram Kishen to be in the handwriting of Ram Rekha Lal, the father of the deceased, who, it was proved, kept this book. It is impossible to believe that Ram Rekha would have forged entries to discredit the application of Jagarnath. The letters, Exs. F. G. H., are also proved by Sital Pershad, and we cannot place any reliance on Babu Jagarnath's denial of the initials as his. In our opinion, Jagarnath, when denying his acquaintance with the Kaithi character and the English alphabet, is trying to prove too much, and we cannot believe his evidence on those points. It was for the applicant to prove the genuineness of the will, and as he has in our opinion failed to do this, it is impossible to suggest that the will is rejected on suspicion only.

"For the above reasons, we are unable to agree with the findings and judgment of the learned District Judge. On the other hand we hold that the applicant has failed to prove that the document Ex. I is the will of Babu Chhote Narayan Pershad and that it was duly executed by him. We accordingly set aside the judgment and order of the lower Court and in lieu thereof dismiss the application with costs."

On this appeal,

DeGruyther, K.C., and *E. D. Jackson*, for the appellant, contended that the action of the High Court in admitting additional evidence was improper and not warranted by the Code of Civil Procedure. And the case of *Kessowji Issur v. Great Indian Peninsula Railway Company* (1) was referred to as showing that the use of the procedure provided by section 568 of the Civil Procedure Code was only legitimate "when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent." In the present case the appeal had only been partly heard, and though no objection was taken at the time, there seemed to be no "substantial reason" given as required by section 568 why the additional evidence should have been taken. As to the extracts from the account book they were put in by the pleader for the first time before the High Court on appeal. The book of accounts was not properly proved, and the inferences drawn from such extracts might well be erroneous.

Ross, for the respondent *Manna Koer*, contended the objection under section 568 of the Code had not been taken

(1) (1907) I. L. R. 31 Bom. 381 ; L. R. 34 I. A. 115.

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before ; the parties had in fact agreed to the additional evidence being taken, and the objection could not now be raised for the first time on this appeal. As to the account book, the passage from the High Court judgment set out above was referred to in which they mentioned the book and the three entries extracted from it. It could not be taken for granted that the evidence of the unexamined witnesses would have supported the appellant's case. The High Court had their evidence before them, which the lower Court had not, and it did not satisfy the High Court. The presumption was in favour of the High Court judgment being right unless it was clearly shown to be wrong.

De Gruyther, K.C., replied.

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The judgment of their Lordships was delivered by SIR ARTHUR WILSON. This is an appeal from a judgment and decree of the High Court of Bengal dated the 3rd of March, 1904, which reversed those of the District Judge of Gaya of the 6th of August, 1901.

The main question raised on the appeal is as to the genuineness of the will, purporting to have been made by one Chhote Narayan Pershad, and dated the 21st of December, 1900. Chhote Narayan died on the morning of the next day to that on which the will bears date, and left a widow, the respondent Manna Koer, and a daughter Lakshmi Koer. Chhote Narayan was the adopted son of one Jokhi Lal. After Jokhi Lal's death one of his widows adopted the respondent Hanuman Pershad. The appellant is the brother by birth of Chhote Narayan Pershad, their father being one Ram Rekha Lal.

The will purported to make various provisions for the testator's wife and daughter, and appointed the now appellant, the testator's brother by birth, as residuary legatee and executor.

The appellant applied for probate of the will in the Court of the District Judge of Gaya. Caveats and written statements were filed in answer, and the case was heard before the District Judge. Three of those who appear as attesting

witnesses to the will were called at the hearing. The other two attesting witnesses, and the appellant himself, were not examined by the applicant; they were tendered for cross-examination but not cross-examined. Evidence was called on the other side. The District Judge was satisfied that the testimony to the genuineness of the will, and the competency and *animus testandi* of the testator, was overwhelming, and the evidence on the other side altogether untrustworthy; and he granted probate accordingly.

The respondents appealed to the High Court of Bengal. That Court made an order at the hearing of the appeal for the examination, as witnesses, of the appellant himself and the two witnesses to the will who had not been examined in the first Court. Those persons were accordingly examined. The High Court also admitted certain extracts from books of account alleged to have been kept by the testator. In the result the High Court held that the circumstances connected with the alleged execution of the will were involved in suspicion, and that the will was not sufficiently proved; and accordingly a decree was passed which set aside that of the District Judge, and dismissed the application for probate with costs. Against that decree the present appeal has been brought.

On the argument of the appeal it was objected that the examination of the three witnesses by the Court of Appeal was irregular: but it appears that that examination was taken with the assent of both sides. It is not open, therefore, to anybody to complain of it now.

It is objected, secondly, that the admission of the account books on appeal was irregular. But there is nothing to show that that admission was objected to at the time.

Their Lordships thus have to face the position that, on a pure question of fact, the two Courts in India have differed, and the materials before those two Courts have not been entirely the same.

The question their Lordships have to answer is, whether they shall advise His Majesty that the decree of the High

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Court should be reversed. That they cannot do, unless they are satisfied that the decree appealed against was wrong, and they are not so satisfied.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant will pay the costs of the respondent, Musummat Manna Koer, who alone defended the appeal.

Appeal dismissed.

Solicitors for the appellant : *T. L. Wilson & Co.*

Solicitors for the respondent Manna Koer : *Barrow, Rogers & Nevill.*
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[On Appeal from the High Court at Fort William in Bengal.]

Transfer of Property Act (IV of 1882) ss. 83, 84—Deposit made in full discharge of mortgage bond—Withdrawal of money by Receiver as agents of mortgagees—Withdrawal without following the provisions prescribed by the Act—Principal and Agent—Sonthal Pergunnahs Settlement Regulation III of 1872, s. 6, as amended by s. 24 of Regulation V of 1893, construction of, as to amount of interest recoverable on bond—Interest previously paid by debtor whether to be taken into account in making decree.

On 27th July 1885 a simple mortgage bond for Rs. 34,000 providing for interest at 18 per cent. per annum, and on default in payment compound interest at the same rate, was executed by a debtor, now represented by the respondents in favour of one of a firm of money-lenders, the transaction being admittedly governed by section 6 of the Sonthal Pergunnahs Settlement Regulation III of 1872, as amended by Regulation V of 1893. On 27th October 1890, interest to the amount of Rs. 23,403-15-6 had at various times been paid and that was all that was due for interest up to that date. Nothing more was paid until, on 17th August 1895, the mortgagor being anxious to redeem the mortgage tendered to the mortgagee, in full discharge of the bond, the sum of Rs. 44,596-0-6, a sum fixed, as amounting together with the interest already paid, to Rs. 68,000, which by section 6 of Regulation III of 1872, as

* *Present* : LORD ATKINSON, LORD COLLINS, LORD SHAW, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

amended by section 24 of Regulation V of 1893, was the full amount (being double the principal) which the mortgagor considered could be recovered from him on the bond. On tendering that amount the mortgagor demanded the return of the bond, but the mortgagee, though willing to give a receipt for the money, could not give him the bond, and the mortgagor deposited the money in Court under the provisions of section 83 of the Transfer of Property Act, that is, in full discharge of the bond. Notice of the deposit was sent to the mortgagee, but the money was not withdrawn until 23rd September 1896, when a Receiver appointed in a partnership suit between the members of the mortgagee's firm succeeded in withdrawing it by some means not disclosed, and without the provisions of the Transfer of Property Act for such withdrawals being followed. On 7th February 1900 the mortgagee and his partners brought a suit on the bond for Rs. 33,698-9, in which they credited the amount of Rs. 44,596-0-6 as having been paid in part satisfaction of the bond on the day when it was drawn out, and charged interest and compound interest at 12 per cent. on the entire sum (Rs. 22,859-5) shown to be due on that date. The pleas in defence were section 6 of Regulation III of 1872 as limiting the amount of interest recoverable, and the deposit under section 83 of the Transfer of Property Act as being a full discharge of the bond. The High Court, affirming the decree of the Subordinate Judge, held in the construction of the Regulations that the plaintiffs having received the principal and a sum for interest equal to the principal there was nothing more due and dismissed the suit.

Held, by the Judicial Committee, that in the absence of anything to show that he had any greater power or authority to withdraw the money than the plaintiffs themselves had, the Receiver must be taken to have withdrawn it, subject to the conditions prescribed by section 83 of the Transfer of Property Act, that is, in full discharge of the bond.

The plaintiffs were bound by the acts of their agent and could not rely upon the Receiver's default in omitting to perform any of the necessary conditions, in order to escape from the consequences which would of necessity have followed the withdrawal if everything prescribed by the Act had been rightly done.

APPEAL from a judgment and decree (14th January 1905) of the High Court of Judicature at Calcutta, which affirmed a judgment and decree (4th September 1901) of the Subordinate Judge of Dumka.

The plaintiffs were the appellants to His Majesty in Council.

The suit out of which the present appeal arose was one on a mortgage dated 27th July 1885, to which the Sonthal Pergunnahs Settlement Regulation III of 1872 was applicable. The mortgage was executed by Raja Udit Narayan Singh, who was the husband of the first respondent, and the adoptive father of the second, of his taluka of Kasba in favour of

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Harbhakt, who was the father of the fourth appellant, and the partner of appellants 1 to 3. The mortgage money was a sum of Rs. 34,000, and it was stipulated that interest should be paid yearly at the rate of Re. 1 per cent. per mensem, and that in default of payment, compound interest should be paid at the same rate. From time to time payments were made on account of interest, and on 27th October 1890 the whole of the interest due up to that date was discharged, the amount being Rs. 23,403-15-6.

In 1886 a suit was brought for the dissolution of the partnership between the mortgagee and his partners to whom part of the money advanced on the mortgage had belonged; and by virtue of various assignments executed in 1895 and 1896 in pursuance of the decree made in that suit on 21st August 1892, the appellants 1 to 3 became interested in various proportions in the rights of the mortgagee under the mortgage. Subsequently the mortgagee died and his interest passed to the fourth appellant.

Meanwhile in August 1895 the mortgagor was desirous of discharging the mortgage and made a tender to the mortgagee, but the latter was unable to return the deed which was in the possession of his partners or one of them with whom he was litigating. The mortgagor accordingly on 17th August 1895 paid the money into Court under section 83 of the Transfer of Property Act (IV of 1882) in full discharge of the mortgage, and the mortgagor asked to have the bond returned to him. The amount so paid into Court was Rs. 44,596-0-6, which, together with the sums already paid on account of interest Rs. 23,403-15-6, amounted to Rs. 68,000. After this deposit was made a Receiver was in June 1896 appointed in the partnership suit, and on 23rd September 1896 the sum deposited was drawn out of Court by him.

Subsequently the mortgagor having died Keshobati Kumari, the first respondent, entered into possession of the estate under his will, and on 7th February 1900 the appellants brought the present suit against the widow and adopted son of the mortgagor, joining also as third defendant a subsequent

encumbrancer on the land. The plaintiffs alleged that the sum of Rs. 33,698-9 was due for principal and interest, and prayed for a decree for sale of the mortgaged property.

The amount sued for was made up in this way. When the amount was deposited by the mortgagor a notice was issued to the plaintiffs, but in reply they declared in September 1895 that the deposit was insufficient. The plaintiffs in bringing the suit, instead of adjusting their claim to 17th August 1895 when the deposit was made, made their adjustment to the date when the Receiver drew out the money, namely, 23rd September 1896. In that way they made their total claim Rs. 67,455-5-6, and after deducting the amount of the deposit claimed Rs. 22,859-5 and interest Rs. 10,839-4, amounting to Rs. 33,698-9 as being still due.

The defence was that the plaintiffs were not entitled to the decree sought for two reasons, firstly, that there had been drawn out of Court on behalf of the plaintiffs the sum paid in 1895 under section 83 of the Transfer of Property Act in full discharge of the mortgage debt; and, secondly, that the mortgagor having, as was admitted, paid the amount of the principal Rs. 34,000, and also sums on account of interest equal in amount to the principal, no further sums could be claimed under section 6 of the Sonthal Pergunnahs Settlement Regulation (III of 1872) as amended by section 24 of Regulation V of 1893.

On the pleadings issues were settled, of which only the second and third were material on this appeal:

“(2) Are the plaintiffs entitled to recover more than Rs. 68,000 the amount they admit having received?

“(3) Can the plaintiffs claim compound interest? How much, if any, compound interest have they charged and received?”

The material portion of section 6 of Regulation III of 1872, as amended by section 24 of Regulation V of 1893, is as follows:—

“All Courts having jurisdiction in the Sonthal Pergunnahs shall observe the following rules relating to usury, namely:—

(a) No compound interest arising from any intermediate adjustment of account shall be decreed

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- (b) The total interest decreed on any loan or debt shall never exceed one-fourth of the principal sum if the period be not more than one year, and shall not in any other case exceed the principal of the original debt or loan.

“Explanation: The expression ‘intermediate adjustment of account’ in clause (a) of this section means any adjustment of account which is not final, and includes the renewal of an existing claim by bond, decree or otherwise, when without the passing of fresh consideration, the original claim is increased by such renewal.”

“Illustration: A bond is given for Rs. 75, of which Rs. 25 are interest. Unless the obligee can prove to the satisfaction of the Court that he gave such consideration for the bond as rendered the transaction fair and equitable, of the Rs. 75 Rs. 50 only will bear interest and the limit of the claim on the bond be Rs. 100.”

So far as material, sections 83 and 84 of the Transfer of Property Act enact:—

“Section 83. At any time after the principal money has become payable and before a suit for redemption of the mortgaged property is barred, the mortgagor . . . may deposit, in any Court in which he might have instituted such suit, to the account of the mortgagee, the amount remaining due on the mortgage. The Court shall thereupon cause written notice of the deposit to be served on the mortgagee, and the mortgagee may, on presenting a petition . . . stating the amount then due on the mortgage, and his willingness to accept the money so deposited in full discharge of such amount, and on depositing in the same Court the mortgage-deed, if then in his possession or power, apply for and receive the money, and the mortgage-deed so deposited shall be delivered to the mortgagor.

“Section 84. When the mortgagor has tendered or deposited in Court under section 83 the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender or as soon as the mortgagor . . . has done all that has to be done by him to enable the mortgagee to take such amount out of Court.”

The District Judge held, on the construction of the above-mentioned Regulations, that the interest could not exceed the principal, and that as the plaintiffs had received Rs. 68,000 on the mortgage bond, no further sum could be decreed to them. He accordingly made a decree dismissing the suit with costs.

From that decree the plaintiffs preferred an appeal to the High Court, which was heard by Chandra Madhub Ghose and Pargiter JJ., who differed in opinion with regard to the construction to be placed on the amended section 6 of Regulation III of 1872.

Ghose J. was of opinion that the words “the total interest decreed on any loan shall not exceed the principal of the

original debt or loan " meant the amount of interest for which a decree was given, without taking into consideration the amount of interest paid by a debtor, in regard to which no claim was advanced in the suit and no decree given. Pargiter J., on the other hand, was of opinion that in every case an account should be taken of all payments made by the debtor, and that on the true construction of the section no further interest could be claimed as soon as the amount paid on account of interest was equal in amount to the principal.

Owing to this difference of opinion the case was referred to Sir F. W. Maclean C.J. for decision on this point, and he agreed with Pargiter J. The appeal was, therefore, dismissed with costs.

On this appeal,

DeGruyther, K.C., and *E. U. Eddis*, for the appellants, contended that, on the true construction of section 6 of Regulation III of 1872 and section 24 of Regulation V of 1893, the appellants were entitled to recover the full amount claimed in their plaint. The words "the total interest decreed" were to be taken in their literal sense. All that the Court had to see to was that the interest decreed in any particular suit did not exceed the limit prescribed. Section 6, as amended, did not contemplate that any transaction between the parties by way of payment of interest previous to the date from which it was claimed should be taken into account. The illustration to the section is not applicable to the present case, because after the adjustment of 27th October 1890 all the interest had been paid up, and only the principal was due, and it is that amount with interest and deducting the sum paid into Court that the appellants claim a decree for. Under the law from which the Regulations under discussion were taken, there was no limit laid down as to the amount that might be paid as interest; the only limit was that no decree would be given for interest to a larger amount than the principal, and the same was the case with the Hindu Law of Damdupat. Reference was made to Regulation XV of 1793, ss. 2, 6, 7 and 8,

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Act XXVIII of 1855; *Dhondu Jagannath v. Narayan Ramchandra* (1), *Nobin Chunder Banerjee v. Romesh Chunder Ghose* (2) and *Shama Charan Misser v. Chunilal Marwari* (3). The High Court at Calcutta on its original side does not, while applying the rule of Damdupat, take any account of the interest paid before suit in making a decree in a mortgage suit. The construction of the old law, therefore, did not support the construction contended for by the respondents, and upheld by the majority of the High Court in the present case.

It was also contended that the amount of the appellants' claim should not be reduced on equities said to arise in consequence of the deposit in Court by the mortgagor under s. 83 of the Transfer of Property Act. The appellants had throughout treated this deposit as a part-payment in satisfaction of the mortgage debt. When they received notice of it, they replied that the amount was insufficient to meet the total amount remaining due on the bond and requested that the mortgagor should be asked to deposit the balance; but they received no answer to that communication. They then presented a petition for the appointment of a Receiver for the withdrawal of the deposit from the Court, and a Receiver was duly appointed who, after various unsuccessful attempts, at length succeeded in obtaining the money deposited. The only lawful way, under the circumstances, of withdrawing it was by the assent of the mortgagor who had deposited it, and it might, therefore, well be assumed that the Raja's assent was obtained to its withdrawal in part satisfaction of the debt. This question, though raised in the pleadings, was not dealt with by the Courts below where the defence was rested entirely on the construction of the Regulations, and it might almost be said it was not really in issue in the Courts in India. There was no finding on it by those Courts, and, if necessary, the case might be remanded to the first Court to take further evidence on the question. As authority that under such circumstances the course

(1) (1863) 1 Bom. H. C. 47.

(2) (1887) I. L. R. 14 Calc. 781.

(3) (1898) I. L. R. 26 Calc. 238.

suggested was desirable: *Owners of Ship "Tasmania" v. Smith* (1), per Lord Herschell L.C.

Kenworthy Brown, for the respondents, contended that the withdrawal of the money deposited under section 83 of the Transfer of Property Act precluded the appellants from maintaining their suit, and consequently this appeal should fail: *Dal Singh v. Pitam Singh* (2). The money could only have been legally withdrawn if the appellants accepted it in full discharge of the mortgage bond, it having been so deposited. As it was withdrawn on behalf of the appellants, it must be presumed that it was taken out with the conditions attached to it by section 83, and under section 84 interest ceased from the time it was deposited. There was no suggestion in the evidence that the Raja assented to its withdrawal. This deposit was pleaded as a defence, and was in issue throughout the case, as the second ground of appeal from the Subordinate Judge to the High Court showed. Mr. Justice Pargiter referred to the question at the end of his judgment as follows:—"One other matter may be referred to as constituting an equitable right that the defendants may assert against the plaintiffs. When the Raja made the deposit of Rs. 44,596 in August 1895, he made it as being a full satisfaction of the plaintiffs' claims. They demurred to his allegation and asserted the sum could be only a part satisfaction. What proceedings took place thereupon have not been fully explained to us, and apparently were not elucidated in the evidence; but their Receiver was permitted to draw out that amount. They are now seemingly endeavouring to take advantage of their own sharp practice. At that time they had two courses, either to accept the sum on the Raja's terms or to leave it in deposit until their own contention was established in a suit. In the former event that sum would have fully satisfied this bond; in the latter event that sum would have gone in full or partial satisfaction of any decree they might have obtained, and their claim at that time was fast approaching the maximum limit of Rs. 68,000. What they did was neither; but having

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(1) (1890) L. R. 15 A. C. 223, 225.

(2) (1902) I. L. R. 25 ALL. 179.

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succeeded somehow or other in drawing out the money, they now contended that it was a simple part-payment, and that they have a fresh start before their claim can mount up to that maximum In my view, however, they have already received the maximum amount legally recoverable, and can obtain nothing further."

As to the construction of section 6 of the Sonthal Pergunnahs Regulation III of 1872, as amended by Regulation V of 1893, the object of it was to restrict usurious interest on loans, to limit the amount of interest recoverable to an equitable sum, and so to protect the inhabitants of a district supposed to be in need of such legislation. It was submitted that the proper construction was that put on the Regulations by the majority of the High Court on appeal, and that all sums paid by the debtor on a bond should be taken into account in making a decree, so that no more than an amount of interest equal to the principal should be recovered by the creditor. Clause (b) of section 6 with the illustration limits the amount recoverable as interest. Reference was made to Act XXVIII of 1855; and as to the law of Damdupat, *Dhondu Jagannath v. Narayan Ramchandra* (1) and *Gopal Ramchandra v. Gangaram Anand Shet Marwadi* (2).

DeGruyther, K.C., replied.

The judgment of their Lordships was delivered by

May 11.

LORD ATKINSON. This is an appeal from a decree of the High Court of Judicature at Fort William in Bengal, dated the 14th January, 1905, affirming a decree of the Subordinate Judge of Dumka, Sonthal Pergunnahs, dated the 4th September, 1901, by which the suit of the plaintiffs (the appellants) was dismissed. The facts, so far as it is necessary to state them, are as follows.

On the 27th July, 1885, Raja Udit Narayan Singh, since deceased, executed a mortgage of his taluka of Kasba in favour of one Harbhakt Das, now also deceased, for a sum of Rs. 34,000, bearing interest at the rate of 1 rupee per cent. per

(1) (1863) 1 Bom. H. C. 47.

(2) (1895) I. L. R. 20 Bom. 721.

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mensem. The mortgage deed contained a provision that, on default being made in the payment of interest at the stipulated dates, compound interest should be charged at the same rate, *i.e.*, 12 per cent. per annum. At the date of the mortgage, the mortgagee carried on the business of cloth merchant and money-lender at Bhagalpur and Calcutta in partnership with the first three appellants. On the 3rd January, 1895, Harbhakt Das executed to his partner, the first appellant, a mortgage of the mortgaged lands and the money secured thereon. On the 11th June, 1896, he executed a similar mortgage in favour of Bansidhar Marwari, the second appellant. Harbhakt Das afterwards died, leaving the fourth appellant, his only son, him surviving. During Harbhakt's lifetime disputes arose and suits were instituted between him and his co-partners in reference to the business of the partnership, and especially in reference to their respective interest in the moneys secured by the above-mentioned mortgage of Raja Udit Narayan Singh. The respondents are the widow and adopted son of the Raja, and a second encumbrancer on the mortgaged lands.

Default having been made in the payment of the interest, compound interest became payable and was claimed by the mortgagee. Large sums were from time to time paid by the mortgagor in discharge of it, and ultimately, on the 27th October, 1890, arrears of interest, amounting to Rs. 11,829-14-6, were discharged by a payment of Rs. 2,606-11-6 in cash and the execution by the mortgagor of a new bond (*roka*) for Rs. 9,223-3-0 with interest at the same rate, *i.e.*, 1 rupee per cent. per mensem. The interest which had accrued due up to this date, and was discharged by payments in cash and the execution of the abovementioned *roka*, amounted altogether to Rs. 23,403-15-6.

Towards the end of July, 1895, the mortgagor, being anxious to redeem the mortgage, sent one Banwari Lal Panrey to the mortgagee to tender to him a sum of something over Rs. 44,000 in full discharge of the only amount the mortgagor alleged to be then recoverable on his bond. This particular

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sum was fixed upon because it amounted to the difference between Rs. 68,000 (double the principal sum advanced) and the amount already paid in respect of interest; and the contention of the mortgagor was that, under section 6 of Regulation III of the Sonthal Pergunnahs Settlement Regulations, 1872 (as amended by Regulation V of 1893), which would admittedly apply to any suit brought to recover this interest, the most that could be recovered from him was Rs. 34,000, a sum equal to the principal money lent. The decision both of the Subordinate Judge and of the High Court turned upon the construction of this Regulation.

Banwari Lal, whose evidence is uncontradicted, states that Harbhakt Das had no objection to receive the money apparently in full discharge, and to give a receipt for it; but that, on the witness's insisting on obtaining delivery of the bond, with the receipt endorsed on the back of it, in exchange for the money, Harbhakt Das stated that his partners had the bond, that they were on bad terms with him, and that he could not obtain possession of it. The witness states that he thereupon refused to pay the money, and that Harbhakt Das asked him to deposit it in Court. The mortgagor accordingly presented a petition to the Court of the Subordinate Judge of Dumka, under the provisions of section 83 of the Transfer of Property Act, 1882, praying for liberty to deposit in Court, in favour of the persons entitled to the mortgagee's interest, the sum of Rs. 44,596-0-6, and for a return of the bond. Upon this petition an order was, on the 17th August, 1895, made to the following effect:—

"As apparently the suit, if put in, would not be barred, the amount will be received under section 83, Act IV of 1882, and deposited, and a written notice will issue to the mortgagee to take the amount."

In paragraph 7 of the plaint in the present suit it is stated that the Court of the Subordinate Judge issued a notice to the plaintiffs requiring them to take out of the sum deposited. It is further stated, in paragraph 8, that the plaintiffs, on receipt of this notice, informed the Sub-divisional Officer of Dumka that the amount deposited was insufficient, that an erroneous calculation had been made, and requested him to

require the mortgagor to deposit the balance of the money due over and above the sum lodged.

It is not now disputed that the mortgagor was entitled under this Act to make the deposit, and that, upon his doing so, the rights of the mortgagee, or those representing him, were as follows. He was entitled, on presenting a petition (verified in the manner prescribed) stating the amount due on the mortgage and his willingness to accept the money deposited in full discharge of this amount, and, in addition, on depositing in the Court in which the money was lodged the mortgage deed, if then in his possession or power, to apply for and receive the money. And, under section 84 of the Act, interest on the principal moneys ceased to run from the date of the tender, or as soon as the mortgagor had done all that has to be done by him to enable the mortgagee to take the money deposited out of Court, as the case might be.

The money deposited was permitted to lie in Court till the 23rd September, 1896. It was then, by some manoeuvre or contrivance, upon which the appellants, for reasons best known to themselves, have deliberately abstained from letting in the light, drawn out by their agent, and applied to their own use. In the statement of account attached to their plaint the appellants, no doubt, credit the respondents with the sum so drawn out as a payment made on the day on which it was drawn out, but interest was charged at the rate of 12 per cent. for the eleven months on the entire sum shown to be due on the 17th August, 1895.

On the 7th February, 1900, the suit out of which this appeal arises was instituted, praying for the recovery of Rs. 33,698-9, of which Rs. 22,859-5 is the balance that remained due at the time when credit was given for the sum paid in, the remainder representing compound interest, calculated from that date till the commencement of the action and, in default of payment, for the sale of the property mortgaged.

The only information given by the appellants as to the steps taken by them to draw out, in violation of the above-mentioned provisions of the Transfer of Property Act, the

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money deposited, is contained in paragraphs 9 and 10 of their plaint, and in the evidence of Ram Chandra Marwari, the principal plaintiff. From the former it appears that the appellants presented a petition to the High Court at Fort William for the appointment of a Receiver for the withdrawal of the money from the Court of the Subordinate Judge; that on the 26th June, 1896, an order was made on this petition appointing a Receiver with all the powers conferred by section 503 of the Civil Procedure Code; and lastly, that the Receiver so appointed, after various attempts, at last succeeded in withdrawing the fund from Court. But neither the petition nor the order is printed in the Record, nor is any information afforded as to the precise nature of the persistent and, unfortunately, successful efforts of the Receiver to defeat the law, while the evidence of Ram Chandra Marwari contains many important admissions. In the course of his cross-examination this witness says that in his petition to the High Court he stated:—

“That in the latter part of July 1895 the Raja was prepared to pay the whole amount due on the bond in suit, but that Harbhakt prevented his paying it, and that thereupon the said Raja had deposited the money in the Court of the Subordinate Judge of Dumka.”

No doubt he states in his cross-examination that he did not in his petition “admit that the Rs. 44,000 deposited by the Raja was in full payment of our dues.”

It is apparent from this evidence that the Receiver was appointed solely because Harbhakt and his partners, owing to their quarrels, would not join in an application to draw out the money deposited. There is nothing to show that the Receiver was clothed with any right or authority in reference to the money, or the withdrawal of it from Court, other than, or different from, that which belonged to those on whose behalf he was appointed. As they were bound to comply with the requirements of the statute under which it was paid into Court, so was he. It was not contended, it could not be contended with any show of reason, that either the High Court or the Subordinate Judge had, save with the consent of the mortgagor or his representatives, any jurisdiction

to permit the money deposited to be drawn out of Court on any terms other than those imposed by the statute. There is no proof that either of those Courts ever made an order purporting to exercise such a power, while there is not a particle of evidence to show that the mortgagor, or those who succeeded him, ever gave any consent, express or implied, to the money being drawn out in part discharge, as opposed to full discharge, of his, or their, liability on the bond. There is no proof that any demand was made on the mortgagor after the money was paid into Court, and it is admitted that nothing was paid in respect of the mortgage, either for principal or interest, since that date. It is not suggested that the present is not the first suit instituted to recover any portion of it. In the cross examination of Ram Chandra Marwari the following passage occurs :—

“When notice was sent us of the deposit, we sent a petition of objection to this Court. We did not get any reply to this objection. I have not filed a copy of the objection, nor have I called for the original.”

This is the only evidence going to show that any objection was made to accept the sum of Rs. 44,000 in full discharge of the mortgage debt. Yet after a delay of close upon $4\frac{1}{2}$ years—i.e., from the 17th August, 1895, the date of the deposit, till the 1st February, 1900, the date of the institution of this suit—and in face of this evidence, Mr. DeGruyther, on behalf of the appellants, invites their Lordships, notwithstanding the state of ignorance of the actual facts in which his clients have deliberately left them, to assume that the deceased Raja assented to the Receiver's drawing the money out of Court, in part satisfaction of the former's liability—because, it is said, the Receiver could not have obtained it otherwise without violating the law—or, if not, to send the question back for further enquiry to the Subordinate Judge.

In their Lordships' opinion they can make no such assumption as that suggested. The assumption which they are entitled to make, and indeed bound to make, is precisely the opposite. The Act provides that money lodged, as this was, “in full discharge” of a liability can only be drawn out by a creditor in full discharge of that liability. The agent of the

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appellants appointed *ad hoc* drew out this money. It is for them to show that he acted under such conditions that the statutory result does not follow from his act. If they fail to do this, as they have failed in the present case, then there is nothing to defeat or modify the operation of the statute, and the consequences must be those which it prescribes. Mr. DeGruyther objected to their Lordships considering this question, on the ground—quite legitimate if well founded—that the defendants rested their defence solely on section 6 of the above-mentioned Regulation, and that the question of the circumstances under which the Receiver drew out the money, or the legal consequences of his doing so, was not in issue in the suit.

It is quite true that no issue has been framed in which the fact of the withdrawal is specifically mentioned. But the second issue is quite wide enough to cover it. The issue runs thus :—

“Are the plaintiffs entitled to recover more than Rs. 68,000, the amount they admit having received?”

This issue, as framed, leaves it open to the defendants to contend that the plaintiffs are not entitled to recover more than Rs. 68,000, either because section 6 prohibits it, or because they have received “in full discharge” the sum paid into Court. And in the statements contained in paragraph 7 of the written statement of the first defendant, and in paragraph 5 of that of the second defendant, as well as in the evidence of Ram Chandra, Bansidhar and Banwari Lal, it is distinctly put forward that the sum of Rs. 44,000 was tendered by Banwari in full satisfaction of the bond, and that both Harbhakt and Ram Chandra were, apparently, willing to accept it as such.

In the memorandum of appeal filed in the High Court by the appellants, the second of the three grounds of appeal against the decision of the Subordinate Judge set forth runs as follows :—

“2. For that the Court below has erred in holding that the receipt of the amount already paid operated as a bar to the recovery of the amount in claim.”

It cannot, therefore, be contended that the plaintiffs had not notice that the receipt of the money deposited would be relied on as a defence.

Their Lordships are, therefore, of opinion that the plaintiffs must be held bound by the act of their agent with all its results ; that if he has omitted to perform any of the conditions necessary to entitle him, on their behalf, and for their use and benefit, to draw this money out of Court, they cannot rely upon his default in this respect, to escape from the consequences which would, of necessity, have followed the withdrawal, if everything prescribed by the statute had been rightly done ; and that the money drawn out must, therefore, be held to have been drawn out in full discharge of the mortgagor's liability. The sum now sued for is, consequently, not due, and the suit must accordingly be dismissed.

The conclusion at which their Lordships have arrived on this point is in itself sufficient to dispose of the appeal, and renders it unnecessary for them to express any opinion the proper construction of section 6 of the 3rd Sonthal Pergunnahs Regulation. They will, therefore, humbly advise His Majesty that the appeal should be dismissed.

The appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants : *Sanderson, Adkin, Lee & Eddis.*

Solicitors for the 1st and 2nd respondents : *T. L. Wilson & Co.*

J. V. W.

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APPELLATE CIVIL.

Before Mr. Justice Harington and Mr. Justice Mookerjee.

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v.

THE ADMINISTRATOR GENERAL OF BENGAL.*

Diluvion—Alluvion—Eviction by Landlord—Rent, suspension of—New tenants on reformed land.

When land has been lost to a holding by diluvion and subsequently restored by alluvion, and then settled with persons other than the tenants of the holding, the tenant is not entitled to a suspension of the entire rent on the ground that the landlord has evicted him from a portion of the demised premises.

Dhunput Singh v. Mahomed Kazim Ispahain (1), *Harro Kumari Chowdhurani v. Purna Chandra Sarbogyia* (2) and *Kali Prasanna Khasnabish v. Mathura Nath Sen* (3) distinguished.

SECOND APPEAL by the defendants, Rai Charan Shar Mazumdar and another.

These two appeals arose out of two analogous rent-suits on account of arrears of two under-tenures. The defendants claimed reduction of rent on the ground of loss of land for diluvion, and also pleaded that they were entitled to suspension of rent, as reformed lands had been let out by the plaintiff to third persons who were in possession thereof

The Munsif decreed the suits partly, allowing rent at the admitted rates, holding that it lay upon the plaintiff to show what apportionment of rents should be made and that the plaintiff had not done it. In both these cases, the plaintiff appealed. The Subordinate Judge remanded the case for definite findings as to the proper *jama* to be paid by the tenants, holding that the burden of proof is on the

* Appeal from Appellate Decrees, Nos. 916 and 856 of 1907, against the decrees of S. C. Ganguli, Subordinate Judge of Jessore, dated Jan. 10, 1907, reversing the decree of Hem Chandra Mitter, Munsif of Magura, dated March 31, 1906.

(1) (1896) I. L. R. 24 Calc. 296.

(2) (1900) I. L. R. 28 Calc. 188.

(3) (1907) I. L. R. 34 Calc. 191.

tenants in case of claim for reduction of rent. Another Munsif tried the suit after remand. He dismissed the suits, holding on the authority of *Dhunput Singh v. Mahomed Kazim Ispahain* (1) that the tenants were entitled to suspend the whole rent, as they were practically evicted from a portion of the lands. The appeals were heard by another Subordinate Judge. He decreed the appeals in part, holding that the Munsif had no right to allow the case for suspension of rent, as he was restricted by the order of remand to the amount of *jama* only. The defendants appealed to the High Court.

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Babu Sarat Chandra Roy Chowdhuri (*Babu Janakinath Pal Sastri* with him), for the appellants. When there is no question that the land reformed is a part of the holding, the landlord must be taken to have dispossessed the tenants from a part, he having settled the same with a third person after reformation. The fact that the land was lost to the holding by an act of God does not affect the principle laid down in *Dhunput Singh v. Mahomed Kazim Ispahain* (1), when the land reappeared and became part of the holding: see also *Harro Kumari Chowdhrani v. Purna Chandra Sarbogya* (2) and *Kali Prasanna Khasnabish v. Mathura Nath Sen* (3). The principle that the landlord cannot apportion his own wrong applies here as much as it applies to cases of trespass by landlord.

Babu Jogesh Chandra De, for the respondent. The cases cited by the appellant do not apply. The landlord cannot be said in this case to be a wrong-doer.

Babu Sarat Chandra Roy Chowdhuri, in reply.

Cur. adv. vult.

HARINGTON J. I have read the judgment my learned brother is about to deliver and I agree that the decrees of the lower Court should be affirmed subject to the modification which he proposes.

(1) (1896) I. L. R. 24 Calc. 296.

(2) (1900) I. L. R. 28 Calc. 188.

(3) (1907) I. L. R. 34 Calc. 191.

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The principal question in the case is whether, when land has been lost to a holding by diluvion and subsequently restored by alluvion and then settled with persons other than the tenants of the holding, the tenant is entitled to a suspension of the entire rent on the ground that the landlord has evicted him from a portion of the demised premises.

The question whether an eviction by the landlord of the tenant from a part of the demised premises justifies the tenant in refusing to pay rent for the remainder of the holding he continues to occupy is one on which it is unnecessary for me to express an opinion, for in the present case the tenant is clearly not entitled to a suspension of the rent, because he has not been dispossessed by any tortious act on the part of the landlord, but by the act of God, *i.e.*, the encroachment of the river.

The law regulating the relations between the parties, *i.e.*, the Bengal Tenancy Act, section 52, provides that a tenant shall be entitled to an abatement of rent in respect of any deficiency in area in the holding. The tenant, therefore, ceased to be liable to pay rent in respect of the land diluviated, and the lands ceased to be in the occupation of the tenants, for they had disappeared.

There is no finding of fact that the tenants ever re-occupied the land when it had reformed. If they never re-occupied that land they could not be evicted, because a man can only be evicted from lands which are in his own occupation at the time of the eviction.

In the present case the tenants ceased to occupy or to be liable to pay rent for the lands in question, a long time before the landlords settled the lands with other tenants. The landlords, therefore, by making this settlement did not evict the tenants.

I agree in the orders which my learned brother would make on these appeals.

MOOKERJEE J. These are appeals on behalf of the defendants in two actions for arrears of rent. The substantial defence to the claim was that large quantities of land appertaining to the tenancies had been washed away by the river Hanu,

that after reformation, the plaintiff had settled them with third parties, that such conduct on the part of the landlord fell within the description of eviction, that consequently the entire rent was suspended and the claim of the plaintiff could not be sustained.

The Court of first instance overruled these objections and made a decree for the amount, which, according to the admission of the defendants, was proportionate to the quantity of land still in their occupation. Upon appeal, the Subordinate Judge directed an enquiry into the question of the quantity of land which had been washed away and of which the defendants had lost possession. After remand, the Court of first instance held that the plaintiff was not entitled to succeed at all, inasmuch as the defendants had been evicted from a part of their tenancies. Upon appeal, the Subordinate Judge reversed this decision on the ground that the Court of first instance had no jurisdiction to decide any point which had not been expressly referred to it, and in this view made a decree for rent in respect of the lands in the actual occupation of the defendants.

The defendants have now appealed to this Court, and on their behalf the decision of the Subordinate Judge has been assailed substantially on the ground that, upon the facts found, there has been an eviction of the defendants from a part of the demised premises and consequently a suspension of the entire rent. Two minor points have also been urged, namely, *first*, that the decree of the Court of appeal below contains a clerical error and that the amount decreed is more than what is really due; and, *secondly*, that the costs of the local investigation by which the actual area of the lands in the occupation of the defendants was determined ought not to have been thrown entirely upon the tenants who have been successful in their contention that in any view there must be an abatement of rent.

In support of the first contention, reliance has been placed upon the cases of *Dhunput Singh v. Mahomed Kazim Ispahain* (1),

(1) (1896) I. L. R. 24 Cal. 296.

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Harro Kumari Chowdhurani v. Purna Chandra Sarbogyia (1), and *Kali Prasanna Khasnabish v. Mathura Nath Sen* (2). In the first of these cases, it was ruled upon a review of the earlier decisions in this Court, as well as the decisions in the cases of *Upton v. Townend* (3), *Edge v. Boileau* (4), and *Neale v. Mackenzie* (5), that if a tenant is evicted by his landlord from part of the demised premises, the entire rent is suspended. In the second case, it was ruled that the same principle is applicable, even though the tenure, from a part of which the tenant has been evicted, was created under a lease under which the rent was reserved at a certain rate per bigha. In the third case, it was held that, although in the case of a partial eviction for which the landlord is responsible, the entire rent is suspended, if the partial eviction has been caused by an act of a stranger, the rent is only abated *pro tanto*. Let it be assumed on the authority of these cases that if a tenant has been evicted by his landlord from a part of the demised premises, the entire rent is suspended. But the question remains, whether a tenant can be said to be evicted by his landlord within the meaning of this rule when he loses possession in the first instance by reason of an act of nature, namely, as in this instance, the action of a river, and subsequently upon reformation of the land, the landlord settles it with a stranger. In order to determine whether the rule ought to be extended to a case of this description, the principle upon which it is founded requires examination. The reason was stated in old cases to be that the landlord ought not to be encouraged to injure his tenant whom by the policy of the feudal law he ought to protect. The reason given in modern cases is that the landlord cannot be permitted to apportion his own wrong. The older reason will be found set forth in Bacon's Abridgment, Ed. 1832, Vol. VII, p. 62, where it is stated that "no man may be encouraged to injure or disturb his tenant in his

(1) (1900) I. L. R. 28 Calc. 188.

(4) (1885) 16 Q. B. D. 117.

(2) (1907) I. L. R. 34 Calc. 191.

(5) (1836) 1 M. & W. 747 ;

(3) (1855) 17 C. B. 30 ;

46 R. R. 478.

104 R. R. 562.

possession whom by the policy of the feudal law he ought to protect and defend." The later reason will be found set forth by Chief Justice Hale in *Hodgkins v. Robson* (1), in which he stated that "if the lessor enters into a part by wrong, this would suspend the whole rent, for in such a case he shall not so apportion his own wrong as to enforce the lessee to pay anything for the residue." The reason for the rule was investigated by Mr. Justice Holmes in *Smith v. McEnayne* (2), where the learned Judge refers not merely to the two reasons just mentioned, one based on considerations partly of a feudal nature and the other on the ground that the landlord cannot apportion his own wrong, but also to the following statement by Lord Chief Baron Gilbert in his Treatise on Rents at page 178: "Because by the demise, every part of the land was equally chargeable with the whole rent, therefore the lessor shall not by his own act discharge any part from the burden during the continuance of such contract. This indeed may be a good reason why the whole rent service shall be suspended, if the lord or lessor disseizes, or ousts his tenant or lessee of any part of the land, because there is a wrongful act to which the tenant consented not, and if it were not attended with a total suspension of the rent until he makes restitution of the land, it would be in the power of the lord or lessor to resume any part of the land against his own engagement and contract, and so by taking that which lies most commodious for the tenant, render the remainder in effect useless, or put him to expense and trouble to restore himself to such part by course of law." If these reasons for the rule are borne in mind, can it be contended on any intelligible principle of law that it should be extended to cover a case where the tenant in the first instance loses possession of part of the demised premises by an act of nature which neither he nor his landlord could control. It cannot be suggested that this is a case in which the landlord by his own wrong has withdrawn a part of the land demised and ought not consequently to recover rent either on the lease or outside of it for the occupation of the residue. Nor can it

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(1) (1667) 1 Vent. 276.

(2) (1897) 170 Mass. 26; 24 Am. S. Rep. 270.

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be suggested that this is a case in which the lessor discharges a part of the land from the burden and charges the rest with the rent which issues out of the whole land. It is further worthy of note that under section 52 of the Bengal Tenancy Act, the Legislature has provided that, in a contingency of this description, the tenant would be entitled to proportionate abatement of rent. The abatement, therefore, when it first commences is not due to the action of the landlord, nor is it claimed by the tenant by reason of reduction in the area of the tenancy caused by a wrongful act of the landlord. This is, therefore, manifestly a case to which it would be unjust on principle to extend the rule, which, it may be observed, has been adopted in England not without considerable divergence of opinion. For instance, in *Stokes v. Cooper* (1) it was ruled by Chief Justice Dallas that the whole rent was not suspended, if the tenant continued in possession of the residue of the demised premises, but that he would be liable on *quantum meruit*. This was stated as the law in standard treatises on the law of landlord and tenant subsequently published, and was accepted as the correct view by the Court of King's Bench in Ireland in *Grand Canal Company v. Fitzsimons* (2). It was not till Baron Parke questioned the decision of Chief Justice Dallas in *Reeve v. Bird* (3) that the tide turned, and the point was finally settled in *Upton v. Townend* (4). It would not be right to extend the application of a rule of this description which may often operate harshly, to cases to which the principle on which it is founded is clearly inapplicable. If a contrary view were maintained, there might be manifest hardship and injustice, for instance, when land has been diluviated and reformed, it is often a matter of considerable difficulty even for Courts of Justice to determine whether the land which has re-appeared is a reformation on the old site. If, under circumstances like these, the landlord lets out the newly formed land to a stranger at the risk of the entire

(1) (1814) 3 Camp. 514 (n);

14 R. R. 829 (n).

(2) (1826) 1 Hud. & Br. 449.

(3) (1834) 1 C. M. & R. 31, 36.

(4) (1855) 17 C. B. 30.

suspension of the rent of the former tenant, he may be unjustly punished when there was no intention on his part to commit any wrongful act: *Henderson v. Mears* (1). It is clear, therefore, that the principle invoked by the defendants, namely, that as the landlord is responsible for the partial eviction of his tenant from the demised premises, there is a suspension of the entire rent, has no application to this case. The principal ground taken on behalf of the appellants must consequently be overruled.

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The next ground taken on behalf of the appellants is that although the Subordinate Judge held in his judgment that the defendants were entitled to abatement of rent for the lands originally diluviated and now no longer in their possession, they have not been granted this relief by reason of a clerical error in the decree. This contention is well-founded. The amin, who made the local investigation and whose return was accepted by the Subordinate Judge, stated that in suit No. 909 out of which appeal No. 856 arises, the total quantity of land was 8 khadas and odd, of which 8 kanis and odd had been washed away and the remaining 8 khadas and odd is in existence out of which the defendants have been dispossessed from two kanis. The quantity of land, therefore, in the possession of the defendants is the difference between these two, namely, 6 khadas and odd. The decree, however, has been drawn up on the footing that the defendants had in their possession 8 khadas and odd. Similarly in suit No. 911, out of which appeal No. 916 arises, the defendants are in occupation of 14 khadas and odd less 3 khadas and odd, that is, about 10 khadas and odd. But the decree has been drawn up on the assumption that they are in occupation of 14 khadas and odd. The learned vakil for the respondent conceded that any clerical error in the decree due to miscalculation must be corrected. This will accordingly be done.

Lastly, it is pointed out that, by an oversight of the Court below, no order has been made as to the costs of the local investigation which were deposited in the first instance by the

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defendants, and the burden of the whole of these costs ought not to be thrown upon them. This contention also cannot be resisted. The position taken up by the defendants in the Court of first instance was that the plaintiff was not entitled to the whole of the amount claimed as rent, because a substantial portion of the lands had been diluviated. This defence has succeeded, and the plaintiff has got a decree for only a portion of the amount originally claimed. It is right, therefore, that the defendants should get a portion at any rate of the costs incurred by them in successfully substantiating their defence. In the circumstances of the case, the costs of the local investigation should be borne equally by the parties. As the whole of these costs appears to have been deposited by the defendant, the decree will provide that they will be entitled to credit for one-half of this amount as against the plaintiff.

Subject to the two amendments mentioned, the decrees of the Courts below will be affirmed, and these appeals dismissed. As the substantial question raised by the appellants has been decided against them and as the amendments in the decree now made might have been secured by an application to the Court below, the appellants must pay the respondent his costs of these appeals.

S. M.

Appeals dismissed.

APPELLATE CRIMINAL.

*Before Sir Lawrence H. Jenkins, K. C.I.E., Chief Justice, and
Mr. Justice Mookerjee.*

SILAJIT MAHTO

v.

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*Rioting—Common object established different from that laid in the charge—
Common object not to enforce, but to maintain the actual enjoyment of a right—
Right of private defence—Excess of that right—Penal Code (Act XLV of
1860) ss. 103 (4), 141 (4), 147, 323 and 324.*

It is not a general proposition of law that a conviction under section 147 of the Penal Code cannot be supported whenever the common object, as stated in the charge, is not precisely made out. The question in each case is whether the common object established agrees in essential particulars with that laid in the charge.

Where the common object set out in the charge was to assault the complainant and his party, who were cutting the paddy of their land, and thereby to forcibly oust them, but the common object established by the facts found by the Sessions Judge was to maintain possession of the land by the accused :—

Held, that the common object in the charge had not been substantially made out, and that the conviction under s. 147 of the Penal Code was, therefore, bad.

Where the accused, who were found to be in possession of the disputed land, went upon it in a large body armed with *lathis*, prepared in anticipation of a fight, and were reaping the paddy grown by them, when the complainant's party came up and attempted to cut the same, whereupon a fight ensued and one man was seriously wounded and died subsequently :—

Held, that on the facts established, the common object was not to enforce a right or supposed right but to maintain undisturbed the actual enjoyment of a right, and that the assembly was not, therefore, unlawful under s. 141 (4).

Where one accused, under the circumstances, caused simple hurt, and another, a fracture of the skull which ended fatally :—

Held, that the former was within his right of private defence, but that the latter had not proved facts bringing the case under s. 103 (4).

THE appellants, Silajit Mahto, Sudhakar, and four others, were tried before the Additional Sessions Judge of Chota

* Criminal Appeal No. 208 of 1909, against the order of J. N. Ghose, Additional Sessions Judge of Chota Nagpur, dated Feb. 8, 1909.

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Nagpur, with the aid of two assessors, and were convicted, on the 8th February 1909, all of them under section 147 of the Penal Code, and Silajit and Sudhakar further under sections 304 and 323 respectively. The two latter were sentenced to five and two years' respectively, and the rest to one year's, rigorous imprisonment each.

The facts of the case, as found by the Sessions Judge, were as follows. There was a long-standing dispute and litigation between the parties of the complainant and the accused regarding certain lands. The accused were in possession, but the complainant's party claimed the land from time to time, though they never succeeded in obtaining possession of it. On the morning of the 26th November 1908, both parties went to the land in large numbers armed with *lathis*, prepared for and anticipating a fight. The accused arrived earlier, and were engaged in cutting the crops when the complainant's party came up and a fight occurred in which Silajit fractured the skull of Brindaban Mahto with a *lathi*, ultimately causing his death, and Sudhakar and Motia Kumar inflicted simple hurt on Baburam Mahto. The accused were charged with "rioting with the common object of assaulting the complainant, Achambit Mahto and his men, who were cutting the paddy of their land, and thereby forcibly ousting them therefrom." The Sessions Judge found that the common object of the accused was not that stated in the charge, but to enforce their right by show and use of criminal force. He held, that the party of the accused went to the field armed and prepared to beat down the opposition which they anticipated to their cutting the paddy, and that they could not, therefore, according to the prevailing judicial opinion, claim any right of private defence, and in any case that, unless they kept within the limits of the right, they would constitute an unlawful assembly within section 141 (4) of the Penal Code. He held, further, that in fracturing the skull of one of the opposite party, while the wounds they received were slight, they had exceeded the right.

Babu Jyoti Prosad Sarbadhikari, for the appellants.

Babu Manmatha Nath Mukerji, for the Crown.

JENKINS C.J. AND MOOKERJEE J. The six appellants before this Court have all been convicted under section 147 of the Indian Penal Code. One of them, Silajit Mahto, has also been convicted under section 304, and another, Sudhakar, has been convicted under section 323. Silajit has been sentenced to rigorous imprisonment for five years, Sudhakar to rigorous imprisonment for two years, and the other four appellants to one year each.

There is no real dispute as to the facts. The learned Sessions Judge has found that the appellants were in possession of their land, and were engaged in cutting the paddy which they had grown. The complainant's party came and attempted to cut the paddy; there was a fight, the result of which was that one man was seriously wounded and subsequently died. The learned Sessions Judge has held upon these facts that the accused are liable to be convicted under section 147 of the Indian Penal Code, inasmuch as they were members of an unlawful assembly, the common object of which was to enforce a right to property.

It has been argued before us that the conviction under section 147 cannot be sustained on two grounds: *first*, that the common object as stated in the charge has not been established; and, *secondly*, that upon the facts found there was no unlawful assembly. In our opinion, each of these contentions is well-founded. The common object, as stated in the charge, was to assault the complainant and his men who were cutting the paddy of their land and thereby forcibly to oust them from the land. The common object which has been established upon the evidence, according to the Sessions Judge, was to maintain possession of the land by the accused persons. It cannot be laid down as a general proposition of law that a conviction under section 147 cannot be supported whenever the common object, as stated in the charge, is not precisely made out. The question in each individual case is whether the common object established agrees in essential particulars with the common object as stated in the charge. In the present case there can be no doubt that the common

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object, as stated in the charge, has not been substantially established. It may, however, be further pointed out that under section 141, sub-section (4) of the Indian Penal Code, which alone is supposed to have any application to the present case, an assembly is unlawful if the common object is shown to be to enforce any right or supposed right. Upon the facts which have been established, the common object here was not to enforce any right or supposed right. It was rather to maintain undisturbed the actual enjoyment of a right. If so, no question of unlawful assembly arises. Under these circumstances, we must hold that the conviction under section 147 as regards all the appellants must be set aside.

As regards the second appellant, Sudhakar, he has been, as already stated, convicted also under section 323. It is argued on his behalf that he is entitled to claim the benefit of the right of private defence. In our opinion this defence is made out. He appears upon the evidence to have caused simple hurt to one of the assailants. He belonged to a party which was attacked by the complainants while he was in peaceful possession of his land. Under these circumstances, it cannot be said that he lost the right of private defence by causing simple hurt to one of his assailants. So far as Sudhakar is concerned, the conviction under section 323 must also be set aside.

So far as the appellant Silajit is concerned, his case stands on a somewhat different footing. It has been contended on his behalf that he is entitled to the benefit of section 103, sub-section (4) of the Indian Penal Code. Unfortunately for him, however, the defence which he took in the Court below was that he was not present at the time of the occurrence. No evidence was, therefore, adduced on his behalf to establish the elements which must be proved before section 103 can be made applicable. It is not shown that he was under any apprehension that death or grievous hurt would be the consequence if he did not exercise his right of private defence. In his case, therefore, the conviction under section 304 must be maintained. As regards the sentence, however, we are of opinion that a sentence of five years' rigorous imprisonment is, in the

circumstances of this case, too severe. He acted evidently upon grave provocation : he was in possession of the property, and he was attacked by a large number of armed people who tried to dispossess him and to carry away his crops. Under these circumstances, we reduce his sentence to two years' rigorous imprisonment. We acquit the other appellants and direct their release.

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CRIMINAL REVISION.

Before Mr. Justice Caspersz and Mr. Justice Ryves.

DASARATH RAI

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May 25.

Jurisdiction—Appeal—Trial of Summons Case—Conviction of Assault and Mischief on summons for Criminal Trespass—Competence of Magistrate who issued process, but did not take cognizance or direct a local investigation, to hear appeal on conviction—Transfer—Irregularity—Criminal Procedure Code (Act V of 1898) ss. 192, 243, 244, 246, 529 (f), 556.

Where an accused has been summoned for criminal trespass, it is open to the trying Magistrate, under s. 246 of the Criminal Procedure Code, to convict him of assault and mischief without re-opening the trial and following the procedure laid down in ss. 243 and 244.

Mudoosoodun Sha v. Hari Dass Dass (1) referred to.

A Magistrate who did not take cognizance of a complaint or order a local investigation but, acting as the officer in charge of the *sudder* sub-division, directed the issue of summonses, holding that the investigating Magistrate had not given satisfactory reasons for recommending the dismissal of the complaint without, however, expressing any clear opinion hostile to the accused, is not incompetent, under s. 556 of the Criminal Procedure Code, to hear the appeal on conviction of the accused.

The irregularity of transferring a case, when the Magistrate is not empowered under s. 192 to do so, is cured by s. 529 (f).

On the 13th December 1908 the petitioners, Dasarath Rai and another, who were servants of one Surja Prosad, the

* Criminal Revision No. 367 of 1909, against the order of J. T. Whitty, Joint Magistrate of Darbhanga, dated March 22, 1909.

(1) (1874) 22 W. R., Cr., 40.

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malik of mouza Dhanauli, went with others upon two plots of land belonging to the complainant, Pathu Sahu, and looted the crops grown by him. Two days afterwards Pathu filed a complaint before Babu Durga Prosad, a Deputy Magistrate of Darbhanga, alleging that the accused with others went to his *khet* and began looting his paddy, that he remonstrated, whereupon two of them struck him with *lathis*, at the orders of the petitioner Dasarath, while some others held him and slapped and fisted him. The Magistrate, considering the story doubtful, made the case over to Babu Rameswar Prosad, a Sub-Deputy Magistrate, for local investigation and report. The latter, after holding an inquiry, submitted a report, on the 24th December, recommending the dismissal of the complaint. The report came before Mr. J. T. Whitty, Joint Magistrate of Darbhanga, who was then in charge of criminal business of the *sudder* sub-division, and he passed the following order :—

“ The inquiring Magistrate was of opinion that the complainant was actually in possession of the land in question, but that he was dispossessed before sowing paddy. I can find no sufficient grounds for this belief. If he was at one time in possession, it is doubtful if he would allow himself to be dispossessed and subsequently, after many months, bring a false case. There has been previous litigation and the case is a doubtful one, but the inquiring Magistrate has not given satisfactory reasons for dismissing it. Summon Dasarath, Hari Jha—s. 447, Indian Penal Code.”

Mr. Whitty subsequently, on the 3rd February 1909, transferred the case to Mr. A. M. Rashad for trial. This Magistrate, after hearing the evidence but without drawing up any charge, convicted the accused under sections 352, 426 and 447 of the Penal Code, and sentenced them only under section 426 to one month's rigorous imprisonment each.

The accused appealed from the conviction and sentences, and the appeal was heard and dismissed by Mr. Whitty on the 22nd March.

Babu Dasharathi Sanyal, Babu Akhoy Kumar Banerjee and Babu Buldeo Singh, for the petitioners.

Babu Srish Chandra Chowdhry, for the Crown.

CASPERSZ AND RYVES JJ. This is a Rule calling upon the District Magistrate to show cause why the conviction and sentence of the petitioners should not be set aside on three grounds : *first*, that the Joint Magistrate had no jurisdiction to try the appeal, inasmuch as he had taken cognizance of the complaint against the petitioners ; *secondly*, that the offence for which the petitioners were tried was one within section 447 of the Indian Penal Code, whereas they have been convicted under sections 426 and 352, which is also contrary to the provisions of section 246 of the Criminal Procedure Code ; and, *thirdly*, that there is no finding as to the necessary intent under section 447 of the Indian Penal Code. Cause has been shown by the learned Junior Government Pleader.

It appears that the complainant charged the petitioners with certain offences. On the 15th December 1908, Babu Durga Prosad, a Deputy Magistrate, who received the complaint and examined the complainant, recorded an order :—
“ Story seems doubtful. To Sub-Deputy Magistrate, Babu Rameswar Prosad, for favour of local investigation and report by 21st December 1908.” The Sub-Deputy Magistrate having examined witnesses submitted a report recommending the dismissal of the complaint. The matter came before Mr. Whitty, Joint Magistrate (then in charge of the criminal business of the *sudder* sub-division) who, without expressing any clear opinion hostile to the petitioners, thought that they ought to be summoned to stand their trial. In the opinion of Mr. Whitty, the Sub-Deputy Magistrate had not given satisfactory reasons for recommending the complaint to be dismissed. On the date fixed, the matter again came before Babu Durga Prosad, Deputy Magistrate, who took bail from the accused persons present in his Court. On the next date fixed, the 3rd February 1909, Mr. Whitty (as *sudder* Sub-divisional Magistrate) transferred the case for disposal to Mr. A. M. Rashad who convicted the petitioners under sections 426, 352, and 447 of the Indian Penal Code, although they had been summoned to answer a charge under section 447 only.

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In these circumstances, we are of opinion that the Joint Magistrate, Mr. Whitty, had jurisdiction to hear the appeal. It is true that he summoned the petitioners as accused persons, but that was because he was in charge of criminal business as we have already mentioned. The cognizance of the case had already been taken on complaint by the senior Deputy Magistrate, and Mr. Whitty did not take action under section 190, sub-section (1), clause (c) of the Criminal Procedure Code, as has been argued that he must have done. If he had no power to transfer the case from the file of Babu Durga Prosad, the irregularity is covered by section 529 (f) of the Criminal Procedure Code. The objection is very technical and has no substance. Moreover, the Joint Magistrate (Mr. Whitty), not having expressed any judicial opinion upon the facts stated in the report of the Sub-Deputy Magistrate, was not incompetent to hear an appeal from the judgment ultimately convicting the petitioners. He was not debarred from so doing by the provisions of section 556 of the Criminal Procedure Code. It may be mentioned in this connection that no objection was taken to Mr. Whitty's trying the appeal, either in the Court below or here, on the ground that he should not try the appeal because he had already formed or expressed an opinion on the merits of the case hostile to the petitioners.

In the next place, in our opinion, it was open to the trying Magistrate to convict the petitioners of the offences of assault and mischief, although they had been summoned to answer a charge of criminal trespass only. The learned vakil relies on the note to section 246 in Sir Henry Prinsep's 14th Edition of the Criminal Procedure Code; but it appears to us, on a plain construction of section 246, that the Magistrate is not bound, when he thinks that other offences have been proved, to re-open the trial and follow the procedure of sections 243 and 244. Such a view would necessitate a re-hearing of all the evidence in the same trial, and is clearly opposed to the manifest intention of the Legislature. It was held, under the Code of 1872, in the case of *Mudoosoodun Sha v. Hari*

Dass Dass (1), that it is open to the Magistrate to "convict an accused person, who has been summoned before him on the footing of a complaint, of any offence which is the subject of the definition in section 148 (now section 4 (*h*) of the Code), if he thinks that the facts established by the complainant and his evidence only amount to an offence within that section," notwithstanding the terms of the summons in answer to which the accused appears in Court.

We think, therefore, that this Rule must fail upon the second ground also.

With regard to the third ground of this Rule, we think that the finding of the Deputy Magistrate as to the necessary intention of the petitioners is sufficient to convict them, and the conclusions at which the Joint Magistrate arrived, on appeal, were to the same effect.

The result is that we discharge this Rule, and direct the petitioners to surrender and serve out their punishment.

E. H. M.

Rule discharged.

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MATRIMONIAL JURISDICTION.

Before Mr. Justice Harington.

BOWEN v. BOWEN.*

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June 14.

Divorce—Collusion—Husband's petition—Agreement between the Parties, not acted on, whether constitutes Collusion.

A petition for divorce was presented by the husband, on the ground of the wife's adultery with the co-respondent. Subsequently an agreement was come to between the petitioner and the respondent, by which, for a pecuniary consideration, the respondent agreed not to defend the suit and to furnish the petitioner with evidence against herself and the co-respondent, should the latter venture to defend the suit. This agreement, however, fell through, and the respondent filed her answer denying adultery, and making a counter-charge of adultery against the petitioner. The co-respondent did not defend the suit. At the trial, the plea taken by the respondent was that the petition should be dismissed on the ground of collusion between the petitioner and herself :—

Held, that inasmuch as the agreement, which contemplated a fraud upon the Court, was not acted on, and in no way affected the decision of the Court, it did not constitute collusion.

Churchward v. Churchward (1) referred to.

ORIGINAL SUIT.

This was a petition by the husband for dissolution of marriage by reason of his wife's adultery with the co-respondent, George Evance. The parties were married in Calcutta in April 1903, the respondent being at the time fifteen years of age and the petitioner thirty-two, and they lived together in various places in the suburbs of Calcutta. There was one child of the marriage, a boy, born in June 1904.

From October 1907, the parties, though residing together, ceased to live as man and wife. In February 1908, the wife left her husband's protection and remained away till October of the same year, when there was a reconciliation, and the wife returned to her husband at No. 9, Dent's Mission Road, Kidderpore, a boarding-house, in which the co-respondent was also a lodger. Subsequently, the petitioner having suspicions as

* Original Civil Suit No. 1 of 1909.

(1) [1895] P. 7.

to his wife's conduct with Evance, moved to Garden Reach taking the respondent with him.

The petitioner and respondent appear to have been unable to get on together. Early in December 1908, they went to Messrs. Ghose and Kar, solicitors, to consult them as to getting a divorce. At this interview, the wife proposed that her husband should go to a house of ill-fame, and that she should have him watched, so as to obtain evidence with a view to divorce proceedings. The husband, however, refused to accede to the proposal.

Later in December, the husband's suspicions were again aroused. He followed his wife on two occasions, on the 16th and 17th December between 8-30 P.M. and 9 P.M., to No. 9, Dent's Mission Road, and discovered that his wife was in the room occupied by Evance. On his return home, on the second occasion, he packed up his things and left the house. On the 19th December, the husband again followed his wife, and saw her in the same room. At a subsequent interview, he informed his wife that he had put the matter in his solicitor's hands.

The petition for divorce was filed on the 7th January 1909, and was followed by a singular correspondence between the petitioner and respondent. On the 19th January the wife wrote as follows: "I believe you have filed your suit for a divorce. What have you done with my summons? I have not received any up to date. You know my address. I hope you will send it to me here and not to Cleavers at Kidderpore. I hope whatever you have against me is nothing but the truth, and not by what you have heard. What you might gain now by lies, you will be punished for hereafter. Well I hope you will gain your desires and be happy." There was another letter from the wife, dated the 26th January, asking for an interview with reference to the child, which was answered by the husband on the 27th January, suggesting that she should call and bring the boy with her. On the 31st January, Mrs. Bowen wrote in the following terms: "I did not send you the letter as promised yesterday as I have since heard Evance is not going to defend; he is going to withdraw his defence, but if I find

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he is going to defend the case, I will send you the letter as promised. I do not see the man any more. I would like to see you about all this, but I think it would be best we don't meet just now. God knows what he is working up. Who knows he might watch us meeting. Whatever I have to say I will write till the road is clear. Don't be afraid of me. I won't play you a double game, if you will only keep to your word. When writing to me, don't do so by the *boodhah* but by post as he might be seen coming here. If Evance withdraws his case, it ought to then come off soon. Let me know how things go on. I will give you something else which will settle the swine properly should he defend. I don't think he will. He hasn't a brass farthing. Ta Ta for the present. Yours, Winnie." There was also an undated letter from Mrs. Bowen, stating that she was trying to get the co-respondent's solicitors not to defend the suit.

On the 9th February 1909, the wife filed her answer. She denied the charge of adultery, and made a counter-charge of adultery against her husband and submitted that he was by reason of this misconduct disentitled to the relief he claimed. The co-respondent Evance did not defend the suit.

At the hearing, the respondent took the further plea that the petition should be dismissed on the ground of collusion between the petitioner and herself. It appeared from the correspondence and the evidence given at the trial that sometime after the 19th January 1909, there was an agreement come to between the petitioner and respondent, by which for a pecuniary consideration the respondent was prepared not only not to defend the suit but to furnish the petitioner with evidence which she believed would be conclusive against herself and the co-respondent, should he venture to defend the suit. This agreement, however, fell through, and was never acted on.

Mr. Pugh (*Mr. Hyam* with him), for the respondent. This petition should be dismissed under section 13 of the Indian Divorce Act. Both previous and subsequent to the petition being presented, there were collusive negotiations between the petitioner and the respondent. It is sufficient that

at some stage of the proceedings, the petition should have been prosecuted in collusion: *Churchward v. Churchward* (1).

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Mr. Stokes, for the petitioner. The true test as to whether there has been collusion between the parties so as to disentitle the petitioner from obtaining relief, is whether the decision of the Court has been affected by the agreement between the parties. There would be collusion, if, by agreement between the parties, material facts were not brought before the Court: the effect would be to commit a fraud on the Court. In the present case, the agreement, inasmuch as it fell through, cannot affect the decision of the Court. The respondent, who has taken this plea, has defended the suit and is in a position to place all the facts before the Court. *Churchward v. Churchward* (1) is distinguishable: there, the petition was presented under an agreement between the parties, the respondent not appearing to defend the suit, and it was on the intervention of the Queen's Proctor, that it was held that the agreement constituted collusion.

Cur. adv. vult.

HARINGTON J. This is a petition by the husband for dissolution of his marriage by reason of his wife's adultery with one George Evance.

The respondent denies the adultery, makes a counter-charge of adultery against her husband and alleges he is by reason of this misconduct disentitled to the relief he claims.

The co-respondent does not defend the suit.

The marriage took place in April 1903, the respondent being at that time fifteen years of age while the petitioner was thirty-two. There was issue of the marriage one child born in June 1904.

According to the petitioner the respondent refused him his marital rights as far back as 1904. The wife denies this and says they lived together until 1907, but the question is of small importance as it is common ground that after the wife's

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return from Mussorie in that year, though residing together, they were not living as man and wife.

Their differences came to ahead in February 1908 : the wife left her husband's protection and remained away until October in that year when there was a reconciliation. At this time the parties were residing at No. 9, Dent's Mission Road—a house kept by a Mrs. Barnes in which the co-respondent was a lodger. The petitioner having, as he says, suspicions as to his wife's conduct with Evance moved to Garden Reach taking the respondent with him. They appear to have been unable to get on together ; they went accordingly early in December to Messrs. Ghose and Kar, the attorneys, to consult them as to getting a divorce. At this interview the wife proposed that her husband should go to a house of ill-fame, and that she should have him watched, so that the evidence she considered necessary for a divorce might be obtained. It is common ground that the proposal was made and that the husband refused to accede to the proposition. The wife asserts and the husband denies that it was in consequence of a suggestion of his that she made this proposal.

Later in December the husband became suspicious, and on the 16th of that month at 8-30 or 9 P.M. he followed his wife who went from their house in Garden Reach to 9, Dent's Mission Road. There he discovered that his wife was in the room occupied by Evance. He was afraid to go in ; but retreated to the next house which was occupied by a friend of his, named Jarratt, whence he could see into the room in which his wife was. He followed her again on the following night taking a detective with him again seeing her in the co-respondent's room. He then went home packed up his things and left the house. On the 19th he followed her again, and again saw her in the same room.

The respondent's account is that she went with her husband and a Parsee as far as the gate of No. 9, and that she went into it to see Mrs. Barnes. She says she went three or four times altogether, and she did go into Evance's room. The hall was being white-washed, and she and Mrs. Barnes and Mr. Cleaver

and Mr. Outhwaite who resided in the house were all there, as well as Mr. Evance. She denies that she ever was alone with Evance or was guilty of misconduct with him.

After her husband left the house in Garden Reach the respondent had an interview with him at the Docks, at which he told her he had put the matter in his solicitor's hands.

The petition was filed on January 7th and then follows a correspondence between the petitioner and respondent, which forms a very singular feature in the case. It begins with a letter from Mrs. Bowen, dated 19th January, which contains the phrase: "I hope whatever you have against me is nothing but the truth, and not by what you have heard. What you might gain now by lies, you will be punished for hereafter."

Then follows another letter from her, dated the 26th January, asking for an interview about the child, which is answered by the husband on the 27th suggesting she should call and bring the boy with her.

Next comes a very remarkable letter dated the 31st January from Mrs. Bowen. She begins by saying that she has not sent the letter she promised, because she hears Evance is not going to defend. She expresses a wish to see Mr. Bowen, but fears being watched by Evance. Then she says "don't be afraid of me. I won't play you a double game if you will only keep your word," and the letter ends with a paragraph. "I will give you something else which will settle the swine properly should he defend. I don't think he will as he has not a brass farthing. Ta Ta for the present. Yours, Winnie."

Then there is an undated letter from Mrs. Bowen stating that she is trying to get the co-respondent's solicitors not to defend the suit.

When questioned about these letters and about the promise referred to, Mrs. Bowen says that, in consideration of being allowed the custody of the child and being paid a sum of Rs. 5,000 by her husband, she agreed to write a letter to her husband admitting her guilt and the "something to settle the swine" was an incriminatory letter which she would write, and "put a back date on it" (to use her own expression), and

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arrange for it to fall into her husband's hands to be used against Evance.

She says that suspecting her husband's *bonâ fides* she got her sister to ask him to deposit the money with her until the case should be over. When he refused to make this deposit, she knew he would not keep his promise and the agreement went off.

Mr. Bowen when cross-examined on these letters gives a very halting explanation about the promise being to keep the case out of the papers.

Nothing transpired after January 31st until the 9th of February when Mrs. Bowen filed her answer.

The case has been fought with vigour by the petitioner and with great bitterness by the respondent.

The first question is, has the adultery been proved ?

[His Lordship then dealt with the evidence, and came to the conclusion that the respondent had committed adultery with the co-respondent.]

The next question is, do the facts disclosed at the hearing establish a case of connivance or collusion so as to debar the petitioner from the relief he claims ?

The circumstance that the wife's adultery took place so shortly after her proposal in the attorney's office might raise a suspicion of connivance, but I do not think there was connivance, because if there was, there was no reason why the respondent should not have asserted it. The admission about the letter she was prepared to write makes it impossible to believe she could have been deterred by any regard for her own character.

On the question of collusion I have no doubt there was an agreement made sometime after January 19th, by which, in consideration of a pecuniary payment, the respondent was prepared not only not to defend the suit, but to furnish the petitioner with evidence, which she believed would be conclusive against herself and against the co-respondent.

But this agreement fell through, probably because the petitioner did not pay.

Had the agreement been acted on, it would have clearly constituted a case of collusion.

But the agreement not acted on, though extremely disgraceful to the petitioner and to the respondent, does not constitute collusion, because it in no way affects the decision of the Court. If parties agree that a matrimonial offence shall be committed, or if they conspire to bring about a state of circumstances from which the Court would infer that a matrimonial offence had been committed, such conduct would be a fraud on the Court and would constitute collusion, or if the parties conspire to lay a false case before the Court or to conceal from the Court facts material for the decision of the case, this would be collusion as it would affect the decision of the case. Further, as is pointed out in *Churchward v. Churchward* (1), there may be a case of collusion where there is an agreement not to defend and where the parties are acting in complete concert in the prosecution of the suit, and the Court is thus deprived of the security for eliciting the whole truth afforded by a contest of opposing interests and is rendered unable to pronounce a decree for dissolution of marriage, with sufficient confidence in its justice. In all these cases the petitioner is disentitled to relief, because he has done something to affect the decision of the case. There has been either *suppressio veri* or *suggestio falsi*, or at the lowest a concert between the parties to bring about a divorce which raises a suspicion that any facts likely to defeat the object of the agreement will not be placed before the Court.

But when parties enter into an agreement to effect a fraud on the Court, and then before anything is done to carry out the agreement, they change their minds, and whether from good or bad motive decline to carry out the fraud they had contemplated, then I do not think their rights are affected. In the present case the agreement in no way affects the decision of the Court, because it was not carried out. The case has been defended and defended with great vigour. No admissions of

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(1) [1895] P. 7.

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any sort have been made, and there is no reason to suppose from the attitude of the parties that the Court has been deprived of any safeguard.

I hold, therefore, that the petitioner is not disentitled to relief in consequence of the arrangement which he and the respondent were at one time prepared to carry out.

There is no evidence at all in support of the recriminatory charges. The respondent has charged her husband with adultery

The evidence of adultery against the husband consists solely of confessions of misconduct which he is alleged to have made to the wife. Even if the wife could be believed as to this, the confessions would not under the canon law have been sufficient, but the husband contradicts her and, for reasons I have stated, I do not consider her a person whose word is to be relied on.

In the result I hold that the wife has committed adultery, that no act has been done by agreement between the parties which has affected the inception, prosecution or decision of the suit; and the recriminatory charges have wholly failed.

There must be a decree nisi with costs against the co-respondent. I make no order with respect to the wife's costs.

J. C.

Attorneys for the petitioner : *Pugh & Co.*

Attorneys for the respondent : *Morgan & Co.*

ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

LAJPAT RAI

v.

"THE ENGLISHMAN," LTD.*

1909

July 6.

Libel—Plea of Justification—Proceedings in Parliament—Privilege—Fair Comment—Mis-statement of Facts—Hansard's Parliamentary Report—Imputation of Criminal Offence—Damages, assessment of—Deportation under Regulation III of 1818.

In an action for libel, if the defendant withdraws the plea of justification, the statements of facts so far as they relate to the plaintiff are presumed in law to be untrue.

A fair and accurate report of the proceedings in Parliament is privileged even though defamatory. But this privilege is limited to the report of the proceedings.

Wason v. Walter (1) referred to.

If the defendant makes a mis-statement of any of the facts upon which he comments, it at once negatives the possibility of the comment being fair. In order to give room for the plea of fair comment, the facts must be truly stated. Such a plea does not extend to cover mis-statements of fact, however *bonâ fide*.

Davis & Sons v. Shepstone (2), *Popham v. Pickburn* (3), *Peter Walker & Son, Ltd. v. Hodgson* (4), *Digby v. The Financial News, Ltd.* (5), *Hunt v. The Star Newspaper Company, Ltd.* (6), and *Thomas v. Bradbury, Agnew & Co., Ltd.* (7) referred to.

Imputing to a person the commission of a criminal offence does not fall within the range of fair comment.

Barrow v. Hem Chunder Lahiri (8) followed.

In assessing the damages in an action for libel, the whole conduct of the defendants from the time of the libel down to the time of the judgment should be looked at.

Praed v. Graham (9) referred to.

In an action for libel, the fact that the plaintiff was deported under the provisions of Regulation III of 1818 should not be taken into consideration as a ground for mitigation of damages.

* Original Civil Suit No. 336 of 1908.

(1) (1868) L. R. 4 Q. B. 73.

(5) [1907] 1 K. B. 502.

(2) (1886) 11 App. Cas. 187.

(6) [1908] 2 K. B. 309.

(3) (1862) 7 H. & N. 801.

(7) [1906] 2 K. B. 627.

(4) [1909] 1 K. B. 239.

(8) (1908) I. L. R. 35 Calc. 495.

(9) (1889) 24 Q. B. D. 53.

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The facts of this case are as follows : The plaintiff was a British subject residing at Lahore in the Punjab. On the 9th May 1907, he was deported to Mandalay, in Burma, under Regulation III of 1818 (extended to the Punjab by Act IV of 1872). He was released on the 17th November 1907. The article complained of appeared in the "*Englishman*," a daily newspaper published in Calcutta, on the 10th September 1907.

[The article in question is fully set out in his Lordship's judgment.]

In February 1908, the plaintiff demanded an apology and compensation from the defendants. As no reply was given, the plaintiff instituted this suit in April 1908 against the defendant company, and the editors, the printer and publisher.

The defendants admitted publication, and the important paragraph in their written statement was as follows :—

"5. These defendants deny that they printed and published the said words maliciously or with intent to injure the plaintiff, and they state that, in so far as the said words consist of allegations of fact, they are true in substance and in fact, and were published in the belief that they were true, and in so far as they consist of expressions of opinion, they are a fair comment made in good faith without malice and on a matter of public interest and importance."

Mr. A. Chaudhuri, Mr. B. Chakravarti, Mr. S. R. Das, Mr. B. C. Mitter, Mr. S. M. Bose and Mr. B. K. Lahiri, for the plaintiff.

Mr. Eardley Norton and Mr. J. E. Bagram, for the defendants.

[*Mr. Chaudhuri* having opened the case for the plaintiff, *Mr. Eardley Norton* stated that he withdrew the plea of justification and asked for information as to which particular portions of the article the plaintiff complained of as being defamatory. The Court was of opinion that the article should be read as a whole.

Mr. Eardley Norton then asked for leave to amend the written statement by adding the words "and that they were published on a privileged occasion," to para. 5. This was disallowed.]

Mr. Chaudhuri. The plea of justification having been withdrawn, the suit becomes an undefended one. There can be no plea of fair comment on facts which are not founded on truth: *Barrow v. Hem Chunder Lahiri* (1), *Davis & Sons v. Shepstone* (2). The article imputes to the plaintiff an offence which is punishable under the Indian Penal Code, section 131, with transportation for life. As to the limits of fair comment, see the latest case, *Peter Walker & Son, Ltd. v. Hodgson* (3).

Mr. Eardley Norton. We say that it is fair comment on a public matter referred to in Parliament by Mr. Morley, a person in responsible position.

[The plaintiff was then examined on his own behalf, but the defendants did not call any witnesses.]

Mr. B. Chakravarti then summed up on behalf of the plaintiff.

Mr. Eardley Norton. The article may be divided into two parts: the first portion contained statements of facts, and the last portion contained comments, and I say fair comments, on what was stated in Parliament and inferences drawn from it. With regard to the first portion they are statements not defamatory on the plaintiff, and that if the latter portion can be excused as privileged or as being merely a fair comment, the truth or otherwise of the first portion does not alter the position: *Toogood v. Spyring* (4), *Hunt v. Star Newspaper Co., Ltd.* (5), *Dakhyl v. Labouchere* (6).

Mr. Bagram (following *Mr. Norton*). 'Comment' and 'privilege' are akin to each other. Whether it is a comment, or is covered by a privilege or is 'excusable' amounts to the same thing. There is very little difference between privilege and fair comment. The head note in *Merivale v. Carson* (7) to the effect that *Henwood v. Harrison* (8) was dissented from is incorrect: see *Thomas v. Bradbury, Agnew & Co., Ltd.* (9).

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(5) [1908] 2 K. B. 309.

(2) (1886) 11 App. Cas. 187.

(6) [1908] 2 K. B. 325.

(3) [1909] 1 K. B. 239.

(7) (1887) 20 Q. B. D. 275.

(4) (1834) 1 C. M. & R. 181.

(8) (1872) L. R. 7 C. P. 606.

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Here is a State prisoner going to be released. His release is a matter of public importance and I, as a citizen, am interested in such a matter and am privileged to state my opinion on this matter and to advocate a contrary policy. If my comments are relevant, I am protected even if the allegations, on which my comments are based, are incorrect. In such a case the only question would be whether there was actual malice on my part: *Davis v. Shepstone* (1), *Merivale v. Carson* (2), *Hunter v. Sharp* (3), *Henwood v. Harrison* (4), *Thomas v. Bradbury, Agnew & Co., Ltd.* (5).

[FLETCHER J. I have already ruled that you cannot go into the question of privilege.]

Then I have nothing more to add.

Cur. adv. vult.

FLETCHER J. This is a suit by the plaintiff to recover against the defendants (who are the proprietors, the editors and the printer and publisher of a daily newspaper called "the *Englishman*," published in Calcutta) damages for an alleged libel on the plaintiff published in "the *Englishman*" on the 10th of September 1907.

The plaintiff is a pleader practising in the Chief Court of the Punjab, at Lahore, where he appears to enjoy a considerable professional reputation. The plaintiff has also identified himself with various religious and charitable movements. In politics also the plaintiff has taken an active part, and for some years he was one of the foremost members of the Indian National Congress.

The plaintiff's position in the Punjab may be, from the evidence, described as that of a man of considerable importance and influence.

In the next place, it will be convenient to give a brief account as appearing from the evidence of the material facts preceding the publication of the alleged libel. In the year 1907, there was pending before the Punjab Legislative Council a Bill

(1) (1886) 11 A. C. 187, 190.

(3) (1866) 4 F. & F. 983; 15 L. T. 421.

(2) (1887) 20 Q. B. D. 275.

(4) (1872) L. R. 7 C. P. 606.

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called the Canal Colonisation Bill. The provisions of this Bill had, rightly or wrongly, given rise to very considerable resentment amongst certain classes of the people of the Punjab. It was said on behalf of the opponents of the Bill that the Bill proposed to alter the provisions of the agreements which had been entered into by the Government, and that such alterations were detrimental to the interest of the colonists. Amongst the colonists were some or perhaps a considerable number of military pensioners, and it is also in evidence that a large proportion of the sepoys in the Punjab are drawn from persons engaged on the land.

An agitation against the Bill was set on foot and the plaintiff interested himself in the opposition to the Bill. There was at this time in the Punjab one Ajit Singh, who was also taking a leading part in the opposition to the Bill. He has been described in certain articles in "the *Englishman*" as the "lieutenant" of the plaintiff.

The plaintiff has denied on oath that he was in any way associated with Ajit Singh and his statement being uncontradicted must, at any rate for the purpose of this case, be accepted. The plaintiff, however, admits being acquainted with Ajit, whom he knew through his brother Kissen Singh, and the manner in which he made Ajit's acquaintance was by reason of Kissen being the manager of an orphanage with which the plaintiff was identified.

There was at Lahore an Association of Zemindars and the plaintiff, in March 1907, was approached by a Mahomedan gentleman, who was the Secretary of this Association with a view to the plaintiff attending a meeting proposed to be held at Lyallpur on the 27th of March 1907 to protest against the Bill. The plaintiff was at first unwilling to accede to the request that he should attend this meeting, as he had recently suffered a severe domestic bereavement by the death of his son-in-law and also on the ground that his own health was not good. The Secretary, however, prevailed upon the plaintiff to agree to attend the meeting, and accordingly a meeting of the Association was summoned to appoint a deputation to be present

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at the meeting. Whether the plaintiff formed one of the deputation or whether the deputation was appointed to accompany the plaintiff to the meeting, the plaintiff is unable to recollect.

On the 27th of March the plaintiff and the members of the deputation proceeded to Lyallpur to attend the meeting. On their arrival at the place of meeting at about 11 o'clock, they found Ajit Singh addressing a large crowd. The plaintiff says one of the members of the deputation made a protest to Ajit Singh as to his addressing the meeting before it had been properly opened. The meeting was then opened. The plaintiff says he was not an office-bearer at the meeting and therefore had no right to determine who should address the meeting. The plaintiff addressed the meeting twice and had a hand in settling the address which was forwarded from the meeting to His Excellency the Viceroy protesting against the provisions of the Bill. Ajit Singh also addressed the meeting. The plaintiff says Ajit used "strong words" both against the Bill and the Government, but he does not think he was guilty of uttering seditious language. The plaintiff says he is not aware that any soldiers were present at the meeting, but admits that military pensioners were present. The plaintiff's evidence is that this was the only meeting upon which he appeared on the same platform as Ajit Singh. As to the meetings at Rawalpindi and Ferozepur, which have been referred to during the progress of this case and were also referred to in the proceedings in Parliament, the plaintiff says as to the meeting at Rawalpindi he knew nothing about that meeting until some time after it had been held, and as to the meeting at Ferozepur the plaintiff says he does not know even now whether this meeting was ever in fact held.

On the 9th of May 1907, the Governor-General in Council, acting under the provisions of Regulation III of 1818 (as extended to the Punjab by Act IV of 1872), deported the plaintiff and Ajit Singh and confined the plaintiff in the Mandalay Jail.

There can be little doubt that at the time of the deportation of the plaintiff, there was considerable political unrest in the Punjab.

In passing, I may state that the Canal Colonisation Bill, after passing through the Punjab Legislative Council, was vetoed by the Governor-General in Council.

Almost immediately following the deportation of the plaintiff, questions were put in the House of Commons with reference thereto. The answers of the Secretary of State to such questions and his speech to the House on the occasion of the debate on the Indian Budget have formed the sole evidence which the defendants have relied upon in this suit.

Sometime prior to the 10th of September 1907, but on what exact date I have not been informed, the Secretary of State made a statement in Parliament which has been called "a half-promise for the release of Lajpat Rai." In the issue of "the *Englishman*" of the 10th of September 1907 appeared the libel complained of.

The alleged libel forms a portion of an article, numbered X, which is one of a series of articles purporting to come from a correspondent "in the Punjab Hills" and is in the following terms :—

"It is about time now that the true facts as to the deportation of Lajpat Rai were given out. Last year the native officers of several of the native regiments in the Punjab confidentially reported to their commanding officers that persistent efforts were being made to tamper with the loyalty of the sepoys. In due course, the commanding officers reported this to the higher military authorities. At the beginning of this year, the native officers of almost every native regiment reported to their commanding officers that the provisions of the Canal Colonies Bill were being used most effectively by the agitators to inflame the sepoys against the Government, and in this connection the names of Lajpat Rai and Ajit Singh were given as the principal agitators. It must be remembered that the Canal Colonists are mostly old soldiers, therefore in close touch with the sepoys. The native officers further urged that unless the provisions of the Canal Colonies Legislation were vetoed, they could not answer for the loyalty of the native Army in the Punjab. The commanding officers confidentially told Lord

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Kitchener that unless the Canal Colony Legislation was vetoed, and Lala Lajpat Rai and Ajit Singh arrested, they could not answer for the loyalty of the native Army in the Punjab. Lord Kitchener lost no time in seeing Lord Minto, and the latter at once telegraphed to the Civil authorities in the Punjab for corroboration of these alarmist reports. The Civil authorities at Lahore were already in a panic as to the occurrences at Lyallpur, and promptly confirmed all Lord Kitchener's statements, but they demurred to the vetoing of the Canal Colonies Legislation, and said the deportation of Lajpat Rai and Ajit Singh would be sufficient. Lord Minto was inclined to side with the Civil authorities in the Punjab, but Lord Kitchener put his foot down and said that if the Canal Colony Legislation was not vetoed and Lajpat Rai and Ajit Singh deported, he would resign as a protest. As neither Lord Minto nor Mr. Morley dared allow Lord Kitchener to resign, the Canal Colony Legislation was promptly vetoed, and Lajpat Rai and Ajit Singh deported. I assert the truth of these statement in spite of any official denials. A long residence in India has taught me that between an official denial and a terminological inexactitude there is a distinction without any real difference. Any way these statements explain the silence of Mr. Morley about Lajpat Rai under the daily heckling he has endured in Parliament for months past. My only reason for now publishing these statements is the half-promise given by Mr. Morley in Parliament for the release of Lajpat Rai. That Lajpat Rai has been guilty of tampering with the loyalty of the Punjab sepoy there can be no possibility of doubt, and, therefore, his release for years to come would only be a dangerous act of criminal folly. The very virtues of Lajpat Rai only make him more dangerous, and it is the half-religious, half-political fanatics of this half-sane, half-mad brand that are always the most dangerous conspirators."

On the 17th November 1907, the plaintiff was released by order of the Governor-General in Council, and on the 6th of February 1908, the attorneys for the plaintiff wrote to the defendants demanding an apology for the statements mentioned

above and compensation for the injury done to the plaintiff. To this letter none of the defendants sent any reply. Accordingly on the 24th of April 1908, the plaintiff instituted the present suit, claiming Rs. 50,000 as damages. The defendants filed their written statements on the 6th of June. By such written statements the defendants pleaded (a) that the statement complained of, in so far as it consists of allegations of fact, was true in substance and in fact, and was published in the belief that such statements were true, and (b) in so far as the statement consists of expressions of opinion, the same was a fair comment made in good faith without malice, on a matter of public interest and importance. Almost immediately after the leading counsel for the plaintiff had opened his case, Mr. Norton, the leading counsel for the defendants, stated that he did not intend to proceed with the plea of justification, but applied for leave to amend the written statements by setting up a plea of privilege.

This application I refused on the following grounds :—*First*, that it would be manifestly unfair to the plaintiff to allow the defendants after the trial has commenced to raise a new defence, of which the plaintiff had no notice ; *secondly*, it was not shown in what manner the defendants could claim privilege or that they had any greater right to comment on the actions of the plaintiff than any other of His Majesty's subjects ; and, *thirdly*, that I noticed that the written statement, which was filed as long ago as the 6th of June 1908, was settled by Mr. Norton in conference, and I considered that the proposed plea of privilege was purely an after-thought which it was desired to raise when it was found by the defendants that the plea of justification would have to be abandoned.

Now the case for the defendants has been put by counsel in the following way :—*First*, Mr. Norton has admitted that the article from its commencement down to and including the sentence " as neither Lord Minto nor Mr. Morley dared allow Lord Kitchener to resign, the Canal Colony Legislation was promptly vetoed and Lajpat Rai and Ajit Singh deported," are statements of fact. But, Mr. Norton says, notwithstanding

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the fact that he is not proceeding with his plea of justification, and therefore these facts, so far as they relate to the plaintiff, are presumed in law to be untrue, yet as the defendants drew their facts from a public document they are to be held excused and not liable for the untrue facts stated in the article. The public document relied on is Hansard's Report of Parliamentary Debates published under the authority of the House of Commons. The argument on this branch of the case may shortly be summarised as follows: 'True, we, the defendants now admit that the statements of facts in our article are untrue, but we were misled by the statements made by the Secretary of State in Parliament and published in "Hansard" from which source we drew our untrue statements and therefore we ought to be excused.' The second branch of Mr. Norton's argument is on the remainder of the article. This portion of the article, he says, consists solely of comment, and, further, that the comment is fair and *bonâ fide* on the facts set out in the previous portion of the article.

I will now deal with the two branches of Mr. Norton's argument.

On the first branch of the case, it will be convenient to state the law as to privilege as to statements made in Parliament. The statements made by members in the House are absolutely privileged, and this privilege would, of course, apply to the statements and speeches made by the Secretary of State and other members in the House of Commons with reference to the deportation of the plaintiff. Further, since the decision of *Wason v. Walter* (1), it has not been doubted that a fair and accurate report of the proceedings is privileged, even though defamatory, but this privilege is limited to the report of the proceedings. It would be a very wide extension of this privilege to hold it to cover any independent statement of facts drawn from Hansard or any other report of the proceedings in Parliament. The proposition is an alarming one—take, for instance, the case of any member of the House carried away by party feeling, making a statement imputing dishonourable

(1) (1868) L. R. 4 Q. B. 73.

or discreditable conduct to a particular individual. Is it, forsooth, to be said that every member of the public by reason of the fact that the statement was made in Parliament and subsequently published in "Hansard," is entitled to impute to that individual, that he has been, in fact, guilty of the dishonourable conduct that was imputed to him by some Member in Parliament? And in the event of the person so defamed coming to Court for redress, is he to be met with a plea that the statement was made in Parliament and subsequently published in "Hansard" and, therefore, notwithstanding that the defendant admits that the statement is untrue, that the plaintiff is to be deprived of his remedy and ruled out of Court solely on the ground that the statement is drawn from "Hansard"? I have not been able to find any statement of the law that would in any way warrant such a proposition and I am convinced that such is not the law. And yet this is the sole defence to the first part of the article. It would be sufficient for me, therefore, to hold that the plea raised by the defendants as to the first portion of the article complained of is bad in law. Having regard, however, to the course this trial has taken, I propose to examine briefly whether the statements in the first portion of the article could, in fact, have been drawn from the statements made in Parliament as reported in "Hansard." Now, the defendants are met *in limine* with this difficulty—the writer opens with a statement: "It is about time now that the true facts as to the deportation of Lajpat Rai were given out." That statement is only susceptible of one meaning, namely, that the facts as heretofore given out were not the "true" facts, and that the writer intended to divulge from some source or other the facts that he says are true. It is agreed that the only facts that had been "given out" at that date, were the statements made in Parliament which the writer implies are not the "true" facts. The defendants are, therefore, in this difficulty—the writer says the facts given out in Parliament are not the true facts, and that he is about to give to the public the true facts; notwithstanding this statement the counsel for the defendants has argued

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that the writer drew his facts which he says are "true" from the facts which the writer implies are not true. This, of itself, would be a serious difficulty against assenting to the argument that the statements in the article were drawn from the reports in "Hansard." As considerable stress, however, has been placed on this point by the counsel for the defendants, I will examine briefly the statements in the article and compare them with the reports in "Hansard."

Now, in the first place, did the Secretary of State give out in Parliament in detail the circumstances under which the Government of India thought fit to deport the plaintiff? Look at the report in "Hansard" of the proceedings in the House of the 18th of June, and read the answer to a question by Mr. O'Grady "I have already said," answers the right honourable gentleman, "almost too often, in answer to my honourable friend and to one or two honourable gentlemen below the gangway on this side, that it is entirely adverse to public interest to go into detail as to the circumstances which the Government of India, with my full assent, thought justified in the application of this law—the law of the land." And yet in the face of this statement it has been argued that the writer drew these minute details of the circumstances relating to the deportation from the statements of the Secretary of State as reported in "Hansard." But, says the counsel for the defendants, even if they cannot show that the writer drew all his facts as to the circumstances relating to the deportation of the plaintiff from the reports in "Hansard," yet he can show that the writer drew from that source the fact that the plaintiff inflamed the sepoys against the Government, which, he says, is the only statement defamatory on the plaintiff. But the passage relied upon by counsel does not support his argument. That passage is taken from the Secretary of State's speech on the Indian Budget of which the report is as follows:—"In this agitation, it is stated, special attention has been paid to the Sikhs, who, as the House is aware, are among the best soldiers in India, and in the case of Lyallpur to the military pensioners." The Secretary of State obviously carefully guarded himself from giving

this statement out as a fact but only as a report, though, no doubt, a report which he had no reason to question or doubt. This is the only statement in "Hansard" to which counsel has been able to call attention as to the tampering with the loyalty of the Sikhs. The statement in "Hansard" falls far short of a statement that in fact the plaintiff had tampered with the loyalty of the Sikhs.

Now, if the article complained of is looked into, it will be seen that the writer opens with a statement of what happened "last year," i.e., 1906, as to certain confidential reports passing between certain military authorities, and then the writer proceeds to give in close detail of what happened in 1907 as to reports from one military authority to another until the reports reach the Commander-in-Chief. Next comes a most minute description of the action of Lord Kitchener on receiving these reports and of the action of His Excellency the Viceroy after an interview with Lord Kitchener, and the writer professes to be so fully acquainted with these details that not only does he inform the public that His Excellency the Viceroy communicated with the Punjab Civil authorities, but he also gives the purport of the message "for corroboration" and the mode by which it was sent—"telegraphed."

The article then gives the reply of the Punjab Government, which the public are told was sent "promptly" and the state of the mind of the Viceroy after receiving that reply, namely, that the Viceroy "was inclined to side" with the Punjab Government. But this view of the case, says the writer, was not in accordance with Lord Kitchener's views, who "put his foot down" and said that unless the Canal Colony Legislation was "promptly" vetoed and the plaintiff and Ajit Singh deported, "he would resign as a protest." Now, where in "Hansard" is there a single statement as to there being confidential reports between the various military authorities or as to the contents of those, or as to the attitude of the Viceroy or Lord Kitchener? The next statement in the article is one of such an extraordinary nature that I will set it out in full:—"As

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neither Lord Minto nor Mr. Morley dared allow Lord Kitchener to resign, the Canal Colony Legislation was promptly vetoed and Lajpat Rai and Ajit Singh deported." And yet the defendants say that the statements in this article were drawn from the reports in "Hansard." If the writer had before him "Hansard's" reports, as alleged by the defendants, he could not have failed to notice the following statement of the Secretary of State. "Nobody appreciates," says Mr. Morley, "more than I do, the danger, the mischief and the iniquity of what is called 'Reason of State.'" Nevertheless in view of this statement, which the defendants say, was before the writer, he does not hesitate to charge His Majesty's principal Adviser on Indian affairs, with having concurred in an act, which he knew to be 'a danger, a mischief and an iniquity' and only to be resorted to, with a sense of gravest responsibility solely because he "dared not allow Lord Kitchener to resign." A more reckless statement than this it is impossible to imagine, and unsupported, as it is, by a tittle of evidence, it is difficult to say whether it is more libellous on the Viceroy, Mr. Morley or Lord Kitchener.

But, says counsel for the defendants, even if this statement is untrue, it has nothing to do with the present case. With that view I am wholly unable to agree. The statement establishes conclusively that the statements in the article were not drawn from "Hansard," and also the recklessness of the statements made by the writer.

It is only necessary, before parting with the first branch of the case, to call attention to the statement of the writer in which he asserts the truth of his "statements in spite of official denials," and calling attention to the fact that there was little, if any, difference between an "official denial" and a "terminological inexactitude." In face of this statement, counsel for the defendants asked me to hold that the writer was not putting forward the statements in the article as true within his own knowledge but only as being drawn from "Hansard's" reports. I decline to do so, and must judge the writer by the language used.

I accordingly find as a fact that the statements in this article were not drawn from statements of Parliamentary Reports in "Hansard," and, secondly, even if they were, the statements are not a fair and accurate report of proceedings in Parliament so as to give to the defendants the protection they now claim for the same. The defendants having withdrawn the plea of justification, I must take it that the statements in the article are untrue.

I now come to deal with the second branch of the case, namely, that the second portion of the article is a fair comment on a matter of public interest and importance. Before dealing with the facts in this portion of the case, it will be convenient to consider briefly what are the limits of the right of fair comment on matters of public interest and importance. And in this respect, the first authority I would refer to is the judgment of the Privy Council in the case of *Davis v. Shepstone* (1), which was delivered by the late Lord Herschell, where he laid down the law in the following terms :—" There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct."

In *Popham v. Pickburn* (2) Wilde, B., said " It was contended, that this libel might be justified as a matter of public discussion on a subject of public interest. The answer is :— This is not a discussion or comment. It is the statement of a fact. To charge a man incorrectly with a disgraceful act, is very different from commenting on a fact relating to him truly stated."

I will only refer to one other case, as it is the most recent authority on the point. The case is that of *Peter Walker &*

(1) (1886) 11 App. Cas. 187, 190.

(2) (1862) 7 H. & N. 891, 898.

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Son v. Hodgson (1) which was recently decided by the Court of Appeal in England.

The Court in that case considered the various earlier authorities and Vaughan Williams L.J. in course of his judgment first lays down that the law is now well settled that fair comment is not a branch of privileged occasion and then proceeds to quote with approval the judgment of Lord Collins, then Master of the Rolls, in the case of *Digby v. Financial News* (2), in the following terms: "Comment, in order to be fair, must be based on the facts, and if a defendant cannot show that his comments contain no mis-statements of fact, he cannot prove a defence of fair comment. If the defendant makes a mis-statement of any of the facts upon which he comments, it at once negatives the possibility of the comment being fair. It is, therefore, a necessary part of a plea of fair comment to shew that there has been no mis-statement of facts in the statement of the materials upon which the comment was based." And the same learned Lord Justice quotes also with approval a judgment of Lord Justice Fletcher Moulton in *Hunt v. The Star Newspaper Co., Ltd.* (3), where the law was defined in these terms: "In order to give room for the plea of fair comment the facts must be truly stated. If the facts, upon which the comment purports to be made, do not exist, the foundation of the plea fails."

There is only one other statement that I will refer to in the judgment of the Court of Appeal, in *Peter Walker & Son v. Hodgson* (1), because I think it states shortly and in ordinary language the limits of the plea of fair comment. At the top of page 257 of the report, Kennedy L.J. quotes with approval from the judgment of Lord Collins in *Thomas v. Bradbury, Agnew & Co., Ltd.* (4), when Lord Collins makes the following statement of the law, namely, that the plea of fair comment "does not extend to cover mis-statements of fact, however *bonâ fide*."

(1) [1909] 1 K. B. 239.

(2) [1907] 1 K. B. 502, 507.

(3) [1908] 2 K. B. 309, 320

(4) [1906] 2 K. B. 627.

Now, turning to the portion of the article which Mr. Norton says is fair comment. The first statement that Mr. Norton says is a comment is in the following terms : "That Lajpat Rai has been guilty of tampering with the loyalty of the Punjabi sepoy there can be no possibility of doubt." That this statement imputes to the plaintiff the commission of an offence punishable under section 131 of the Indian Penal Code, with transportation for life, is not doubted. Mr. Norton has argued that this statement, though defamatory, is a fair comment and therefore ought to be excused. It appears to me that there are two answers to that argument which may be given very shortly. The first is one drawn from the authorities cited by me above, namely, that, if the facts are mis-stated, it at once negatives the possibility of the comment being fair. The facts, as stated in the article, have already been held by me for the purpose of this case to be untrue ; it follows that the comment cannot be fair. The second answer to the argument is one founded on the decision of this Court, in the case of *Barrow v. Lahiri* (1), to which decision I was a party. The Court there decided that imputing to a person the commission of a criminal offence does not fall within the range of fair comment. On both these grounds, I am of opinion that the plea of fair comment fails.

It only remains for me now to assess the damages to be paid by the defendants to the plaintiff. Now, the words used concerning the plaintiff in the present case are of a particularly serious nature and are libellous *per se*. The general damages presumed to be the natural or probable consequences of the words used need not to be proved by evidence. The fact that the libel was published in a newspaper is an important consideration in assessing the damages. As Best C.J. said, in *De Crespigny v. Wellesley* (2), publication in a newspaper may "circulate the calumny through every region of the globe. The effect of this is very different from that of the repetition of oral slander. In the latter case, what has been said is known only to a few persons, and if the statement be untrue, the imputation cast

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(1) (1908) I. L. R. 35 Calc. 495.

(2) (1829) 5 Bing. 392, 402, 405.

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upon any one may be got rid of; the report is not heard of beyond the circle in which all the parties are known, and the veracity of the accuser, and the previous character of the accused, will be properly estimated. But if the report is to be spread over the world by means of the press, the malignant falsehoods of the vilest of mankind, which would not receive the least credit where the author is known, would make an impression which it would require much time and trouble to erase, and which it might be difficult, if not impossible, ever completely to remove. . . . Before he gave it general notoriety by circulating it in print, he should have been prepared to prove its truth to the letter; for he had no more right to take away the character of the plaintiff, without being able to prove the truth of the charge that he had made against him, than to take his property without being able to justify the act by which he possessed himself of it. Indeed, if we reflect on the degree of suffering occasioned by loss of character, and compare it with that occasioned by loss of property, the amount of the former injury far exceeds that of the latter."

Moreover, in assessing the damages the whole conduct of the defendants from the time of the libel down to the time of judgment should be looked [per Lord Esher, M.R., in *Praed v. Graham* (1)], and evidence may be given as to antecedent libels on the plaintiff to show with what mind the words were published.

Now, what has been the conduct of the defendants in the present case? Libels antecedent to the one now complained of have been published in the prior issues of "the *Englishman*." Expression most highly defamatory of the plaintiff were used in these former articles—we find for example that in one of these articles the plaintiff is described as an "arch-conspirator." We have also the fact that a letter demanding an apology was written to the defendants before suit and to this letter they made no reply. Doubtless, this letter demanded compensation to be paid by the defendants. But I cannot see any reason why if they could not prove the statements they

(1) (1889) 24 Q. B. D. 55, 55.

should not have apologised whilst declining to pay the compensation demanded. This refusal or neglect to answer the letter demanding an apology followed by the defendants placing on the record a plea of justification which was not withdrawn until after the trial was commenced, must naturally go to increase the damages. And the fact that no expression of regret for the language has even now been made by the defendants ought also to be taken into consideration. Nor must the conduct of the defendants in publishing this libel without, so far as appears in the evidence, making any enquiry as to what source the writer obtained his alleged facts from be neglected, for it must have been apparent to the defendants that if the statements contained in the article were in fact true the writer must have obtained them through some unauthorised channel. It would have been open to the defendants, if the plaintiff is a well known revolutionary or seditious, to have called evidence in reduction of damages to prove the plaintiff's general bad character. No such evidence having been produced, I must assume that no such evidence is forthcoming. There remains to be considered what effect, if any, in mitigation of damages the fact that the plaintiff was deported ought to have.

Now, the preamble of Regulation III of 1818 recites that reason of State "occasionally render it necessary to place under personal restraint individuals against whom there may not be sufficient ground to institute any judicial proceeding, or when such proceeding may not be adapted to the nature of the case, or may for other reasons be unadvisable or improper." Therefore under the terms of this Regulation the Governor-General in Council may, for reasons of State, place under personal restraint not only persons against whom there is no sufficient ground for instituting a judicial proceeding but also persons against whom the instituting of judicial proceedings would be improper. That the reasons for the determination are kept secret, both from the person deported and the public, sufficiently appears from the third recital in the preamble:—
 "And whereas the ends of justice require that . . . the person affected thereby (*i.e.*, the determination of the Governor-

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General in Council to place a person under restraint) should at all times be allowed freely to bring to the notice of the Governor-General in Council all circumstances relating . . . to the *supposed* grounds of such determination." Is it to be suggested, in these circumstances, where neither the plaintiff nor the public know the reasons for his deportation, and where the only evidence before the Court is the plaintiff's own positive testimony that he has been guilty neither of sedition nor of tampering with the loyalty of the troops, that the Court should take into consideration in reduction of damages the fact that the plaintiff has been deported as evidence affecting his general character and reputation? I think not. It would, in my opinion, be contrary to the spirit of the Regulation to take the fact of the deportation into consideration in assessing the damages.

It may be that one of the reasons the framers of the Regulation had in view in providing that the reasons for the deportation should not be disclosed was to protect the deported person from having the fact of the deportation put against him in evidence as affecting his general character and reputation. For, if two different inferences are by the terms of the Regulation capable of being drawn from the fact that the plaintiff was deported—one that he had been deported for the commission of a criminal offence, the other that he had been deported, not for having committed any offence, but in order to maintain the tranquillity of the country—I think the Court is not at liberty to presume that the plaintiff was deported for the commission of a criminal offence. Moreover, it would be a gross hardship on the plaintiff if the fact of his deportation was admissible in evidence as affecting his general character, for the plaintiff not knowing the reason for his deportation, is absolutely debarred from showing that the Governor-General in Council made a mistake (if the plaintiff was deported for any special reason other than that of maintaining the tranquillity of the country) as to the reasons they thought fit to deport him. The more I study the Regulation the more convinced I am that the framers of the Regulation never intended that the fact of a

person having been deported under the provisions thereof should be admitted in a Court of law as evidence affecting the character of the person deported. In these circumstances, I do not intend to take into consideration as a ground for mitigation of the damages the fact that the plaintiff was deported.

I have reviewed now fully the serious nature of the charge made against the plaintiff, the reckless statement of facts on which it is founded, the setting up by the defendants of a plea of justification which was not withdrawn until after the trial had opened, and that no expression of regret has been made by the defendants. It only remains to call attention to the motive that the writer had in view, namely, to raise in the minds of the public a sense of the danger and insecurity they would be in if the plaintiff was "released, for years to come." The writer has endeavoured to give effect to that motive by giving to the public facts, which are now admittedly false, and comments which I hold to be unfair.

In these circumstances, I think, the damages to be awarded must be very substantial; to do otherwise would, I think, after the course the defendants have seen fit to adopt in this case, be wholly wrong.

Having taken into consideration the whole of the circumstances, I think I ought to award to the plaintiff the sum of Rs. 15,000 as damages, and I give judgment accordingly for the plaintiff for that sum.

The defendants must pay to the plaintiff his costs of this suit on scale No. 2.

Judgment for plaintiff.

S. C. R.

Attorneys for the plaintiff : *B. N. Basu & Co.*

Attorneys for the defendants : *Sanderson & Co.*

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CRIMINAL REVISION.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Caspersz.*

1909
July 15.

RAJANI KANTA DUTT

v.

EMPEROR.*

Transfer of Criminal Case—Grounds of Transfer—Opinion arrived at in another but similar case on other evidence—Criminal Procedure Code (Act V of 1898) s. 526.

The doctrine that a reasonable apprehension in the mind of an accused that he will not have a fair trial is a sufficient ground for transfer is sound, but in applying it regard must be had to the circumstances of each case.

The mere fact that in another case, on other evidence, the Judge has come to a particular conclusion is not in itself a sufficient ground for transfer.

Asimaddi v. Govinda Baidya (1) referred to.

ONE Abhoy Charan Santra was alleged by the prosecution to be a professional forger who used to forge, or cause to be forged, hand-notes purporting to be executed in his favour by his enemies or the enemies of those who solicited his services for that purpose. His house was searched, and eight completed hand-notes, ostensibly executed by different persons in his favor, and several such documents in an unfinished state, were found. Among them were two notes purporting to be executed by one Khoda Bux for Rs. 50 and by Sital Prosad Ghose for Rs. 725, respectively, and three notes by Prahlad Das and his aunt, Teni Mayi, Jadu Pal and Mahendra Pal and his brother, Hriday, tenants of the petitioner, for various sums. A number of prosecutions was, thereupon, instituted on account of these notes. In the first of these cases Abhoy was committed with one Jogeswar, charged under sections 467 and 474, Indian Penal Code, in respect of the note (Ex. 2) bearing Sital Prosad's signature, and with Basanta Kumar Samanta, charged under sections 467, $\frac{467}{109}$ and 474, Indian Penal Code, in respect of the

* Criminal Revision No. 93 of 1909.

(1) (1897) 1 C. W. N. 426.

note (Ex. 5) containing Khoda Bux's signature. The offences were tried separately by Mr. E. E. Forrester, Sessions Judge of Bankura, who convicted the respective accused in two judgments passed on the 12th June 1909, and sentenced them to five years' rigorous imprisonment. In both trials, he admitted in evidence the other hand-notes found in Abhoy's house and held them to be forgeries.

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In *Emperor v. Jogeswar and Abhoy* he made the following observations :—

"As evidence of guilty knowledge and system I would refer to the cases of Jadu Pal, Prahlad Das and Mahendra Pal. Notes of hand purporting to be executed by these men were found in Abhoy's house (Exs. 7, 8 and 6). They all deny execution, and the surrounding circumstances established go to show that their statements are true. It is shown that they were all simultaneously involved in a dispute with the landlord, Rajani Kanta Dutt, naib-nazir of this Court, and it is proved by letters found both in Abhoy's and Dutt's houses that these men were friends, and were in correspondence with each other about some litigation. I hold that these three documents are all forgeries. I am satisfied that other notes of hand found in Abhoy's house were forgeries to Abhoy's knowledge, and it is, therefore, a fair inference based upon this circumstance and the other evidence in the case, that Abhoy knew that Ex. 2 was a forgery."

In his judgment in *Emperor v. Basanta Kumar Samanta and Abhoy Charan Santra* there was the following passage :—

"Should, however, the charge of forgery fail in the Appellate Court, I may say that I am satisfied upon the evidence produced that the notes of hand found in Abhoy's house, which purport to bear the signatures (i) of Prahlad and his aunt, Teni Mayi, (ii) of Jadu Pal, and (iii) of Mahendra Pal and his brother, Hriday, are forgeries; and, therefore, even if there were no other evidence, it is a just inference from the existence of these forgeries in Abhoy's possession that he knew that Ex. 5 was a forgery."

The petitioner was committed by the Additional District Magistrate of Bankura charged under sections $\frac{467}{109}$ of the Penal Code with abetment of the forgery of a hand-note purporting to be executed by the said Prahlad Das and his aunt, Teni Mayi, in favour of Abhoy, and the case stood for hearing, in the file of Mr. Forrester, on the 28th June.

A Rule was issued by CASPERSZ and RYVES JJ. on the District Magistrate of Bankura to show cause why the case against the petitioner should not be transferred for trial to the Assistant Sessions Judge on the ground that the Sessions Judge,

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in delivering judgments in two other cases, on the 12th June, had expressed certain opinions unfavourable to the petitioner. The learned Judges further granted permission to the Sessions Judge to make the proposed transfer himself if he thought it expedient. The Rule now came on for hearing.

Babu Atulya Charan Bose, for the petitioner. The Sessions Judge, on the two trials in respect of the hand-notes in the names of Sital Prosad and Khoda Bux, admitted in evidence the other documents found in Abhoy's house, and among them the note which is the subject of the present case. He held them all to be forgeries, and dealt in his two judgments specifically with the present note, and expressed an opinion unfavourable to the petitioner.

JENKINS C.J. AND CASPERSZ J. Without in any way detracting from the doctrine, which we accept as sound, that a reasonable apprehension in the mind of the accused that he will not have a fair trial is a sufficient ground for transfer, we at the same time hold that in applying that doctrine regard must be had to the circumstances of each case. The mere fact that in another case, on other evidence, the Sessions Judge may have come to a particular conclusion is not in itself a sufficient ground for transfer: and that has been decided by a Division Bench of this Court in *Asimaddi v. Govinda Baidya* (1). On the facts of this case we hold that there should not be a transfer. We feel confident that the learned Sessions Judge, in dealing with the case now under consideration, will not allow his mind to be in any way influenced by any evidence that was adduced before him in the previous case or by any opinion which he then formed on that evidence, and that he will deal with the case without any kind of bias by reason of his decision in the former case. We, therefore, on the facts of this case, discharge the Rule.

E. H. M.

Rule discharged.

ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

MATI LAL RAHA

v.

INDRA NATH BANNERJEE.*

1909

May 26.

Libel—Master and Servant—Publication—Libel by Servant—Scope of Employment—Trade Libel—Libel on Firm—Parties—Privilege—Privileged Occasion—Malice—Evidence of Malice.

A master is liable for a libel written and published by his servant within the scope of his employment.

Citizens' Life Assurance Co. v. Brown (1) followed.

In a suit for libel defamatory of a firm, all the partners should join as plaintiffs.

Le Fanu v. Malcolmson (2) and *Robinson v. Marchant* (3) referred to.

Where there co-exists an interest in the subject-matter of a communication, both in the party making it and in the party to whom it is made, the occasion is a privileged one.

Hunt v. Great Northern Railway Co. (4) followed.

Where the occasion is privileged, the burden of proving actual malice, lies on the plaintiff.

Hebditch v. MacIlwaine (5) referred to.

To prove malice, extrinsic evidence of malice is not necessary. The words of the libel and the circumstances attending its publication may themselves afford evidence of malice.

Clark v. Molyneux (6), *Laughton v. The Bishop of Sodor and Man* (7), *Nevill v. Fine Arts and General Insurance Co.* (8) and *Gilpin v. Fowler* (9) referred to.

ORIGINAL SUIT.

THIS action was instituted by the plaintiffs, Mati Lal Raha and William Joseph Mumford, partners in the Asansol Coal Syndicate, against Indra Nath Bannerjee and his son, Atindra Nath Bannerjee, for a libel alleged to have been published on the 25th July 1908.

* Original Civil Suit No. 748 of 1908.

(1) [1904] A. C. 423.

(5) [1894] 2 Q. B. 54, 58.

(2) (1848) 1 H. L. C. 637.

(6) (1877) L. R. 3 Q. B. D. 237, 245.

(3) (1845) 7 Q. B. 918.

(7) (1872) L. R. 4 P. C. 495, 508.

(4) [1891] 2 Q. B. 189, 191.

(8) [1895] 2 Q. B. 156, 170.

(9) (1854) 9 Ex. 615.

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It appears that in 1902 Indra Nath Bannerjee opened a colliery in the mouza Jote Janki, since which date his coal was sold and known in the market as "Jote Janki" coal. In close proximity to his colliery were situated two other collieries, one belonging to the Singaran Co. and the other to one P. K. Chatterjee—the coal from these collieries being known as "Toposi" and "New Toposi," respectively. The coal produced from all three collieries was known in the market as "second class" coal. It was established in evidence, however, that the coal produced from Indra Nath's pit was superior to the coal produced from the other two pits, and that the "Toposi" coals were about the worst on the market.

In May and June 1908, the Eastern Bengal State Railway called for tenders for the supply of coal for use on their Railway. Indra Nath Bannerjee's firm, Messrs. Bannerjee Santan, tendered for the coal, and in accordance with the practice of the Railway, two wagon loads of "Jote Janki" coal were supplied for the purpose of testing. The coal was duly tested and found to be satisfactory. The result of the test was reported to head-quarters on the 28th June 1908.

On the 30th June 1908, the plaintiffs submitted their tender including therein 30,000 tons of "Jote Janki" coal, at a price 3 annas a ton less than that quoted by Bannerjee Santan. No sample of the coal tendered was delivered to the Railway at the time, nor offered to them until after the date of the alleged libel. It, moreover, appears that on the 30th June 1908 the plaintiffs had no coal coming from the mouza Jote Janki. On the 1st July 1908, however, they entered into a contract with P. K. Chatterjee for the purchase of 24,000 tons of "steam coal from Jote Janki Colliery."

On the 20th July 1908, the Railway authorities accepted the plaintiffs' tender to the extent of 24,000 tons and Bannerjee Santan's tender to the extent of 6,000 tons. It was established in evidence that the Railway authorities accepted the plaintiffs' tender without test, owing to the very satisfactory test Bannerjee Santan's coal had stood and in the belief that the coal tendered for by the plaintiffs was coal of the same quality.

On the 25th July 1908, the following letter, which was the libel complained of, was written and despatched by Bannerjee Santan to the Railway authorities :—

“ 4, Ram Hari Ghose's Lane,
Chambatollah, Calcutta,

25th July 1908.

“ BANERJEE SANTAN,
Colliery Proprietors and Zemindars.

“ To the Manager, E. B. S. Railway,

DEAR SIR,

We beg to bring to your goodself's notice that the Asansol Coal Syndicate have no colliery at or near Jote Janki. We have to inform you that there is no other colliery in Jote Janki, save what we are working. We beg to enclose herewith copy of our letter of date to the Asansol Coal Syndicate. We wonder how the Railway authorities have accepted their tender without making enquiries about the parties and also without trying their coal. We are compelled to write this letter just to safeguard our interest for these people will buy and supply any and every sort of cheap coal to make some profit with the contract in the name of Jote Janki coal, and there will consequently be bad reports on the quality and the name of our Jote Janki coal will be spoiled in your Railway.

Thanking you in anticipation for your prompt action in the matter.

Yours faithfully,
Banerjee Santan.”

This letter was actually written by Atindra Nath Bannerjee who was engaged in the Calcutta Office of the firm of Bannerjee Santan, and whose duty it was to do such of the correspondence as was required to be done in English. Atindra was originally joined as a defendant, but died during the pendency of the suit.

On receipt of the above letter, the Railway authorities caused enquiries to be made, and discovered that the Asansol Coal Syndicate had no colliery at Jote Janki. Thereupon on the 1st August 1908 the Locomotive Superintendent of the Eastern Bengal State Railway wrote to the plaintiffs, enclosing Bannerjee and Santan's letter, and the result of the enquiries instituted thereon, and calling on the plaintiffs to show cause why the contract for 24,000 tons of Jote Janki steam coal should not be annulled under the circumstances. The Railway never in fact took delivery of the coal contracted to be delivered by the plaintiffs.

This suit was instituted on the 10th August 1908. The plaintiffs alleged that the defendants falsely and maliciously

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wrote and published of the plaintiffs in the way of their trade as colliery proprietors and agents and coal merchants, the words contained in the letter of the 25th July 1908, meaning thereby that the plaintiffs cheated or were guilty of fraudulent practices in their trade, and that by reason of the publication of the libel the plaintiffs had been injured in their business and had suffered loss of credit and reputation; and they claimed Rs. 50,000 as damages.

Several pleas were taken in defence. It was submitted that the suit was bad and defective for non-joinder of necessary plaintiffs, inasmuch as one Alf Ogilvie and one P. B. Ghose, who were partners in the Asansol Coal Syndicate, had not been joined as plaintiffs. Without admitting the writing and publication of the letter complained of, the defendant alleged that the words therein contained were true in substance and in fact, and denied the meaning sought to be put on them by the plaintiffs. He further pleaded that the statements were privileged, and were made in good faith on a privileged occasion for the protection of his own interest to a person also interested. Finally, he denied that the plaintiffs had suffered any damage.

Mr. Buckland and Mr. Stokes, for the plaintiffs.

Mr. B. C. Mitter and Mr. Pugh, for the defendant, Indra Nath Bannerjee.

Cur. adv. vult.

FLETCHER J. In this suit the plaintiffs seek to recover damages from the defendants for libel.

It appears that the defendant, Indra Nath Bannerjee, is the owner of a colliery in the mouza Jote Janki. In close proximity to his colliery are situated two other collieries, one belonging to the Singaran Colliery Co. and the other to P. K. Chatterjee, the latter of which is or was until recently called the New Toposi Colliery. In or about the year 1902 the defendant Indra Nath opened up this colliery, and his coal was sold in the market as 'Jote Janki' coal. From the evidence given on behalf of the defendant, which I accept, it appears that the seam

worked by Indra Nath was a superior coal to that worked by the Singaran Co. and P. K. Chatterjee. The coal produced from all three pits is, however, coal that is known in the market as 'second class coal.' There can be little doubt, but that the coal from Indra Nath's pit had become known in the Calcutta market amongst people who deal in this class of coal as 'Jote Janki.' The coal from the Singaran Co.'s pit and P. K. Chatterjee's pit being known as 'Toposi' and 'New Toposi.' The evidence on behalf of the defendant Indra Nath, especially the evidence of Mr. Bowrey of Messrs. Macleod & Co., the Managing Agents of the Singaran Co., is clear as to this. It is also in evidence, as stated by one of the plaintiffs' witnesses, that 'Toposi' coals are about the worst on the market.

I have, therefore, come to the conclusion that in the year 1908 coal from Indra Nath's pit had become well recognised in the market amongst people who deal in second class coal as 'Jote Janki' coal.

In May and June 1908 the Eastern Bengal State Railway was calling for tenders for the supply of coal for use on the Railway.

Indra Nath's firm, Bannerjee Santan, sent in a tender to the Railway, and in accordance with the practice of the Railway Bannerjee Santan supplied to the Railway two wagon-loads of their 'Jote Janki' coal for the purpose of testing. The coal was duly tested in the locomotives of the Railway and found to be satisfactory. The result of the test was reported to head-quarters on June 28th.

Two days later, on the 30th June 1908, the plaintiffs tendered for coal to the Railway. The tender included 30,000 tons of 'Jote Janki' coal.

Now, on the 30th June the plaintiffs had no coal coming from the mouza Jote Janki. On the 1st July, however, they entered into a contract with P. K. Chatterjee for the purchase of 24,000 tons of "Steam coal from Jote Janki Colliery." No sample of the coal tendered was delivered to the Railway nor offered to them by the plaintiffs until after the date of the libel complained of.

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The price in the tender sent in by the plaintiffs was less than that in tender of Bannerjee Santan by 3 annas per ton.

On the 20th July, the Railway authorities accepted the plaintiffs' tender and also the defendants' tender to the extent of 6,000 tons.

The plaintiffs have not thought fit to call any person in authority from the Railway. But from the evidence of the Superintendent of the State Railway in the coal-field as to the enquiries that he was directed to make, there can be little doubt that the Railway authorities accepted the plaintiffs' tender without a test of the coal, owing to the very satisfactory test the defendant's coal had stood and in the belief that the coal tendered for by the plaintiffs was coal of the same quality. On the 25th July, the defendant's firm wrote to the Eastern Bengal State Railway the libel complained of. The letter itself was written by Indra Nath's son, Atindra, who was originally joined as a defendant but who died during the pendency of the suit. Atindra was engaged in the Calcutta Office of the firm of Bannerjee Santan. It was his duty to do such of the correspondence as was required to be done in English. It is said that he was not well acquainted with the English language and that his words must not be too closely looked at. To this I am unable to assent. If a firm choose to employ as their correspondent a person insufficiently acquainted with the language in which he is to correspond, they must bear the consequences. To complete the story: on the 1st August, the Locomotive Superintendent of the Eastern Bengal State Railway wrote to the plaintiffs calling on them to show cause why the contract given to them for 'Jote Janki' coal should not be cancelled. To this the plaintiffs replied by their letter of the 5th August.

This suit was instituted on the 10th August.

The Railway have never taken delivery of the coal contracted to be delivered by the plaintiffs.

Now, the first point taken by the defendant is that the plaintiffs have failed to prove publication. It is said that there is nothing to show that any one in the Railway offices

had read both the tender and the libel, and without reading them both no one would understand that the libel referred to the plaintiffs.

To this argument I am unable to assent. It appears from the letters that have been produced that the tender and the letter both came in the usual course to the knowledge of the Railway authorities. But then it is said that even if this be so, yet as Indra Nath takes no active part in his business and the libel was written without the consent or knowledge of Indra Nath, he is not liable in respect thereof. This point is, however, I think, covered by the decision of the Privy Council in *Citizens' Life Assurance Co. v. Brown* (1). The scope of the servant's authority is the same as the scope of his employment, and it was the duty of Atindra under the defendant's manager to conduct the English correspondence. I think, therefore, that the defendant is liable for this letter published by Atindra in the course of his employment.

Next, it is said that one P. B. Ghosh ought to have been joined as a co-plaintiff. The libel sued for in the present case is a libel defamatory of the firm. The damages, therefore, sued for are for the injury to the joint business, and all the partners should join in such a suit: *Le Fanu v. Malcolmson* (2), *Robinson v. Marchant* (3); see also Lindley on Partnership, p. 315. Does then the evidence show that P. B. Ghosh was a partner in the plaintiffs' firm? Now, condition 1 of the General Conditions printed on the form of tender of the Eastern Bengal State Railway is as follows:—"In the event of the tender being submitted by a firm, it must be signed separately by each member thereof." The tender was signed by the plaintiffs and P. B. Ghosh—the latter signing above the signature of the plaintiff M. L. Raha. The plaintiff Mumford, who gave evidence, says that P. B. Ghosh signed as the person sending in the tender. He was, however, challenged to produce the letter containing the terms of the partnership of the Asansol

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(1) [1904] A. C. 423.

(2) (1848) 1 H. L. C. 637.

(3) (1845) 7 Q. B. 918.

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Coal Syndicate. Counsel for the plaintiffs were also challenged to call P. B. Ghosh who was sitting in Court along with Mumford. The letter of partnership was not produced nor was Ghosh called. I think, therefore, that in the absence of this evidence, and having regard to the fact that any person reading the contract would think that P. B. Ghosh signed as a partner, the inference is that P. B. Ghosh is a partner and I hold accordingly.

We next come to the plea of justification. After the evidence of Indra Nath Bannerjee it cannot be seriously urged that the defendant has succeeded on this plea. The statement that "these people will buy and supply any and every sort of the cheap coal to make some profit with the contract in the name of Jote Janki coal" is, I think, a statement of fact and not a comment, and such words are libellous *per se*.

At the same time if it had become necessary for me to assess the damages in respect of this libel, I should have had to take into consideration the conduct of the plaintiffs. The plaintiffs in their letter of the 5th August 1908, to the Eastern Bengal State Railway, do not allege that they or any one else had ever bought P. K. Chatterjee's coal as Jote Janki coal; all they say is that Chatterjee's coal had been sent by rail from the West Jote Janki Colliery siding. This falls far short of showing that Chatterjee's coal was known as Jote Janki. Moreover, the defendant Indra Nath complained to the Railway authorities of the use by P. K. Chatterjee of the name of West Jote Janki Colliery siding as the name of P. K. Chatterjee's siding, and the Railway Co. altered the name of the siding. In addition to this there is the fact, as I hold the evidence proves, that the defendant's coal was known in the market as "Jote Janki" coal, and that P. K. Chatterjee has not produced any contract prior to that with the plaintiffs on 1st July 1908, under which he sold his coal as "Jote Janki" coal. I think, therefore, that the conduct of the plaintiffs, however innocent it may have been, was largely responsible in provoking the libel, and if it had become necessary for me to assess the damages, I should have had to take such conduct into account,

The main controversy, however, in this case has been upon the plea raised by the defendant that the occasion on which the libel was published was a privileged occasion. The case of privilege on behalf of the defendant is put on the ground that the defendant had an interest in the subject-matter of the communication, and that the Railway authorities had an interest or duty in connection with the same matter.

Now, that the defendant had an interest in protecting the name of their Jote Janki coal cannot be doubted, and that the communication was sent to protect this interest appears on the face of it, for the letter says "we have been compelled to write this letter just to safeguard our interest." The Eastern Bengal State Railway had an interest to obtain what they had contracted for with the plaintiffs, *viz.*, "Jote Janki" coal.

If this be so, there can be no doubt that the communication was made on a privileged occasion.

"The occasion had arisen if the communication was of such a nature that it could fairly be said that those who made it had an interest in making such a communication, and those to whom it was made had a corresponding interest in having it made to them. When these two things co-exist, the occasion is a privileged one, and the question whether it was or was not misused is an entirely different one:" *Hunt v. Great Northern Railway Co.* (1).

I accordingly hold that the occasion on which the communication was made was a privileged one.

This being so, the burden of proving actual malice is cast upon the plaintiffs: *Hebditch v. MacIlwaine* (2). The plaintiff need not, however, adduce extrinsic evidence of malice as he may rely upon the words of the libel and the circumstances attending its publication. "It is sometimes difficult to determine when defamatory words in a letter may be considered by themselves as affording evidence of malice": per Bramwell, L.J.; in *Clark v. Molyneux* (3). If the language used is "much too violent for the occasion and circumstances to which it is applied"

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(1) [1891] 2 Q. B. 189, 191.

(2) [1894] 2 Q. B. 54, 58.

(3) (1877) L. R. 3 Q. B. D. 237, 245.

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or "utterly beyond or disproportionate to the facts," there is evidence of malice to go to the jury. On the other hand, "to hold all excess beyond the absolute exigency of the occasion to be evidence of malice would in effect greatly limit, if not altogether defeat, the protection which the law throws over privileged communications": *Laughton v. The Bishop of Sodor and Man* (1). Or as Lord Esher said "a man may use excessive language and yet have no malice in his mind": *Nevill v. Fine Arts and General Insurance Co.* (2). Having given the best consideration I can to the facts in this case, I have come to the conclusion that the words used in the libel are not so "utterly beyond and disproportionate to the facts" [*Gilpin v. Fowler* (3)] that the letter by itself is sufficient to prove malice. There being no other evidence as to malice, I accordingly hold that the plaintiffs have not discharged the onus that is on them of proving that the defendant was actuated by malice in publishing the libel complained of. In the result, therefore, the present suit fails and must be dismissed with costs on scale No. 2.

Suit dismissed.

Attorneys for the plaintiffs: *Leslie and Hinds.*

Attorney for the defendant: *K. K. De.*

J. C.

(1) (1872) L. R. 4 P. C. 495, 508.

(2) [1895] 2 Q. B. 156, 170.

(3) (1854) 9 Ex. 615.

CRIMINAL REVISION.

Before Mr. Justice Caspersz and Mr. Justice Ryres.

PURNA CHANDRA NANDAN

v.

TARACK NATH CHANDRA.*

1909

May 27.

*Workmen's Breach of Contract Act (XIII of 1859) Preamble and s. 1—
"Artificer, Workman or Labourer"—Person entitled to work by contract and
to percentage of profits—Fraudulent breach of contract—Neglect or refusal
to perform work—Refusal to work for alleged breach of contract by employer.*

A person entitled under his agreement to have the stipulated work performed on the contract system in lieu of pay, and to receive a percentage on the profits as commission with an annual statement of the accounts of the business, a percentage of the reserve fund as commission in the event of the firm being wound up, and a similar percentage on sums drawn from such fund at any time, is not an "artificer, workman or labourer" under the Act.

The neglect or refusal, wilfully and without lawful or reasonable excuse, to perform work or get it performed, as mentioned in s. 1 of the Act, must amount to a fraudulent breach of the contract, as stated in the preamble to it.

Where, therefore, a person left his employment owing to his employer's failure to furnish him with a statement of the business accounts and to pay a percentage of the profits, in accordance with the terms of the contract:—

Held, that there was no such neglect or refusal as to bring him within the scope of s. 1 of the Act.

On the 20th April 1907, the petitioner entered into an agreement with Khan & Co. of 68, Sukea Street, Calcutta, for service in the workshop of the firm, for three years, as a grinder and polisher of surgical instruments and cutleries, receiving an advance of Rs. 54, which was to be repaid by monthly deductions of Re. 1-8 from his pay. He was to receive a salary of Rs. 30 per month, and, in addition, a 10 per cent. of the annual profits, as commission, upon adjustment of accounts at the end of *Assar*, and for that purpose he was to get a statement of the accounts. In the event of the firm being wound up he was entitled to 10 per cent. of the reserve fund as

* Criminal Revision No. 482 of 1909, against the order of A. Salam, Third Presidency Magistrate of Calcutta, dated April 16, 1909.

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or “utterly beyond or disproportionate to the facts,” there is evidence of malice to go to the jury. On the other hand, “to hold all excess beyond the absolute exigency of the occasion to be evidence of malice would in effect greatly limit, if not altogether defeat, the protection which the law throws over privileged communications”: *Laughton v. The Bishop of Sodor and Man* (1). Or as Lord Esher said “a man may use excessive language and yet have no malice in his mind”: *Nevill v. Fine Arts and General Insurance Co.* (2). Having given the best consideration I can to the facts in this case, I have come to the conclusion that the words used in the libel are not so “utterly beyond and disproportionate to the facts” [*Gilpin v. Fowler* (3)] that the letter by itself is sufficient to prove malice. There being no other evidence as to malice, I accordingly hold that the plaintiffs have not discharged the onus that is on them of proving that the defendant was actuated by malice in publishing the libel complained of. In the result, therefore, the present suit fails and must be dismissed with costs on scale No. 2.

Suit dismissed.

Attorneys for the plaintiffs: *Leslie and Hinds.*

Attorney for the defendant: *K. K. De.*

J. C.

(1) (1872) L. R. 4 P. C. 495, 508.

(2) [1895] 2 Q. B. 156, 170.

(3) (1854) 9 Ex. 615.

CRIMINAL REVISION.

Before Mr. Justice Caspersz and Mr. Justice Ryves.

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v.

TARACK NATH CHANDRA.*

1909

May 27.

Workmen's Breach of Contract Act (XIII of 1859) Preamble and s. 1—

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A person entitled under his agreement to have the stipulated work performed on the contract system in lieu of pay, and to receive a percentage on the profits as commission with an annual statement of the accounts of the business, a percentage of the reserve fund as commission in the event of the firm being wound up, and a similar percentage on sums drawn from such fund at any time, is not an "artificer, workman or labourer" under the Act.

The neglect or refusal, wilfully and without lawful or reasonable excuse, to perform work or get it performed, as mentioned in s. 1 of the Act, must amount to a fraudulent breach of the contract, as stated in the preamble to it.

Where, therefore, a person left his employment owing to his employer's failure to furnish him with a statement of the business accounts and to pay a percentage of the profits, in accordance with the terms of the contract:—

Held, that there was no such neglect or refusal as to bring him within the scope of s. 1 of the Act.

On the 20th April 1907, the petitioner entered into an agreement with Khan & Co. of 68, Sukea Street, Calcutta, for service in the workshop of the firm, for three years, as a grinder and polisher of surgical instruments and cutleries, receiving an advance of Rs. 54, which was to be repaid by monthly deductions of Re. 1-8 from his pay. He was to receive a salary of Rs. 30 per month, and, in addition, a 10 per cent. of the annual profits, as commission, upon adjustment of accounts at the end of *Assar*, and for that purpose he was to get a statement of the accounts. In the event of the firm being wound up he was entitled to 10 per cent. of the reserve fund as

* Criminal Revision No. 482 of 1909, against the order of A. Salam, Third Presidency Magistrate of Calcutta, dated April 16, 1909.

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commission, and to a similar percentage on any money drawn out of the fund at any time. He was also given the liberty to get the work done by contract in lieu of pay. The agreement contained a clause that if he wilfully, or without sufficient reason, neglected to do his work or absented himself, except through illness, during the contractual period, he would be punishable under Act XIII of 1859, sections 2 and 3.

The petitioner worked for some time, in 1907, on a monthly salary, and then with the consent of the firm took up the work on contract. In March 1908 he reverted to the salary system, and received an increase of Rs. 10 per month to his pay. He continued to work till November 1908, but, it was alleged, no adjustment of accounts was made in *Assar*, nor was a share of the profits paid to him, though several written demands for the same were made. In the beginning of December he made his last demand, but no notice having been taken of it he left work on the 13th instant. On the 21st the firm sent him a pleader's letter directing his return to work, but he replied, also through a pleader, refusing to do so, and stating the breach of the terms of the contract by the firm as his reason for his refusal. On the 23rd March 1909, Tarack Nath Chandra filed a complaint against him before the Chief Presidency Magistrate, under sections 2 and 3 of Act XIII of 1859; and the case was made over to A. Salam, Third Presidency Magistrate, for trial. The latter by his order, dated 16th April, directed the petitioner to work for one year and a half, till the balance of the sum advanced was repaid, and to enter into a recognizance to do so in the amount of Rs. 50.

Babu Sarat Chandra Roy Chowdhry, for the petitioner.

Mr. S. Chakrabarty and *Babu Hira Lal Chakrabarty*, for the complainant.

CASPERSZ AND RYVES JJ. This is a Rule on the Chief Presidency Magistrate and on the opposite party to show cause why the conviction and order under Act XIII of 1859 passed against the petitioner should not be set aside. We have heard

the learned counsel against the Rule on behalf of the employer and the learned vakil in support of the Rule. It appears that, on the 20th April 1907, the petitioner entered into an agreement with the firm of Messrs. Khan & Co. to work for them for a period of three years as a grinder and polisher of surgical instruments on a salary of Rs. 30 per mensem. He received an advance of Rs. 54, and he agreed to repay it by monthly instalments of Re. 1-8. He continued to work in the firm for about 18 months, and then he left his employment. If the agreement stopped short at the point mentioned, it is possible that the case would come within the provisions of Act XIII of 1859. But it seems to us, having regard to the agreement in this case, that that Act has no application. We have read the agreement, and it is quite clear that there are provisions in it under which the petitioner was entitled to privileges far above those of an ordinary artificer or labourer. For instance, he was entitled, if he chose, to get the work done by contract. He was also entitled to get a statement of accounts annually, and to receive a certain percentage on the profits. In the event of the Company being wound up, he was entitled to a percentage of the reserve fund. Having regard to all these circumstances, we are of opinion that the Act in question has no application, and, even if it does apply, it seems to us that the condition precedent to the operation of that Act is wanting in this case. The preamble to the Act sets out that it is intended to prevent fraudulent breaches of contract. It may be that the preamble of an Act is not to be considered as part of the actual Statute. But, although the word "fraudulent" does not appear in the body of the Act, the words used there are "shall wilfully, and without lawful or reasonable excuse, neglect or refuse to perform or get performed such work according to the terms of his contract." The words are for all practical purposes equivalent to the expression "fraudulent breach of contract" mentioned in the preamble. There is no finding in this case that the petitioner wilfully and without reasonable excuse refused to perform his contract. It is hard to see how such a finding could be arrived at. The petitioner left his employment, he says,

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because his employers failed to perform their part of the agreement. We think the remedy of the parties, if they have any, lies in the Civil Court. For these reasons, the Rule is made absolute. We set aside the order of the Presidency Magistrate.

Rule absolute.

E. H. M.

APPELLATE CIVIL.

Before Mr. Justice Cox and Mr. Justice Chatterjee.

1909
 June 7.

JAGADBANDHU SAHA

v.

RADHA KRISHNA PAL.*

Estoppel—Sale—Mortgage—Unregistered Sale-deed and Mortgage-bond—Transfer of Property Act (IV of 1882) s. 54—Suit for possession and mesne profits.

The principle of estoppel cannot be invoked to defeat the plain provisions of a statute.

Begam v. Muhammad Yakub (1), *Ram Bakhsh v. Mughlani Khanam* (2) and *Karalia Namōhai v. Mansukhram* (3) distinguished.

SECOND APPEAL by the plaintiff, Jagadbandhu Saha.

The plaintiff brought the suit for the recovery of khas possession from the defendants 1 and 2 on the allegation that, the transfer of the lands having failed through the neglect of the defendants 1 and 2 to get the *kobala* (executed in their favour for Rs. 100) registered, the plaintiff was entitled to recover possession of the land with mesne profits, after deducting the sum of Rs. 10, the earnest money, deposited by the defendant.

The Munsif gave a decree as prayed for, but the Subordinate Judge on appeal considered that the equities on the defendants' side preponderated over those of the plaintiff's, and the plaintiff was estopped by his conduct from recovering possession. He

* Appeal from Appellate Decree, No. 2557 of 1907, against the decree of Hari Lal Mukerjee, Subordinate Judge of Tipperah, dated Aug. 28, 1907, modifying the decree of Ashutosh Chatterjee, Munsif of Chandpur, dated Dec. 10, 1906.

(1) (1894) I. L. R. 6 All. 344.

(2) (1903) I. L. R. 26 All. 266.

(3) (1900) I. L. R. 24 Bom. 400.

accordingly modified the decree for the unpaid balance of the consideration money and directed that the same should be charged on the disputed land. Against this judgment the plaintiff appealed to the High Court.

Babu Basanta Coomar Bose, for the appellant.

Babu Romesh Chandra Sen (for *Dr. Preo Nath Sen*), for the respondents.

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COXE AND CHATTERJEE JJ. In this case the plaintiff attempted to sell certain land to the defendants for Rs. 110, and put them in possession. They then attempted to mortgage the same land back to him with some other lands for Rs. 100. Neither the sale-deed nor the mortgage-bond was registered, and the plaintiff brought this suit for recovery of possession on return of the sum of Rs. 10 paid to him by the defendants as part consideration. The Munsif gave him a decree for khas possession and mesne profits subject to the deduction of the sum of Rs. 10 with interest. On appeal, the learned Subordinate Judge considered that the equities on the defendants' side preponderated over those on the plaintiff's, and that the plaintiff was estopped by his conduct from recovering possession. He accordingly gave the plaintiff a decree for the unpaid balance of the consideration money, and directed that this should be a charge on the disputed land.

The plaintiff appeals to this Court and relies on section 54 of the Transfer of Property Act, which lays down that in the case of land worth Rs. 100 and upwards sale can be made only by a registered instrument. If in the case of such property sale can be made only by a registered instrument, it appears to us to follow that where a registered instrument is not executed there is no sale; and if that is the case here, the plaintiff's title is not extinguished and he is entitled to recover possession of the property. The learned pleader for the appellant has cited a number of cases in support of his argument, but the words of the section are in themselves so simple

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and unambiguous that we do not think it necessary to refer to those cases in detail.

On the other hand, it is argued that the plaintiff is estopped by his conduct, having received Rs. 10 as part-payment and put the defendants in possession. But you cannot invoke the principle of estoppel to defeat the plain provisions of a statute, and we cannot evade the effect of section 54 by holding that the plaintiff is estopped from pleading it. The learned pleader for the respondents has relied on two cases decided in the Allahabad High Court, namely, *Begam v. Muhammad Yakub* (1) and *Ram Bakhsh v. Mughlani Khanam* (2). Those cases were different from the one which is now under our consideration, and we do not think that they bind us in any way to hold that the attempted transfer to the defendants in this case was a valid sale. Another case referred to is *Karalia Nanubhai v. Mansukhram* (3). In that case the conveyance was ultimately registered and, therefore, under section 47 of the Registration Act, took effect from the date of sale. That case, therefore, is quite distinguishable from the present one.

In our opinion, the decision of the Munsif is perfectly correct, and this appeal will, therefore, be allowed and that decision restored with costs.

Appeal allowed.

S. A. A. A.

(1) (1894) I. L. R. 16 All. 344.

(2) (1903) I. L. R. 26 All. 266.

(3) (1900) I. L. R. 24 Bom. 400.

CRIMINAL REVISION.

Before Mr. Justice Caspersz and Mr. Justice Ryves.

DALMIR PURI

v.

KHODADAD KHAN.*

1909

June 10.

Criminal Procedure Code (Act V of 1898) s. 147—Use of Water, dispute relating to—Erection of Bund by one party—Order by Magistrate for its removal under police supervision—Injunction by Civil Court restraining the opposite party from interfering with the Bund—Subsequent order by Magistrate directing its removal by the police.

Section 147 of the Criminal Procedure Code contemplates orders directed to the parties to the dispute, and does not enable a Magistrate to enforce his orders, passed thereunder, through the agency of the police.

An order passed some time after the termination of the proceedings under s. 147 of the Code, directing the removal of a *bund* by the police, is without jurisdiction.

Pasupati Nath Bose v. Nando Lal Bose (1) and *Lalit Chandra Neogi v. Tarini Persad Gupta* (2) distinguished.

UPON the receipt of a police report, Syed Naziruddin, Deputy Magistrate of Monghyr, instituted a proceeding under section 147 of the Criminal Procedure Code between Khodadad Khan and another, as first party, and Mohunt Dalmir Puri and others, as second party. The dispute related to the use of the water of a *pyne*. The first party claimed the right to use the water of the *pyne* as irrigating their mouzah Gungapore, and denied the right of the opposite party to close it up by a *bund*. The second party alleged that the *pyne* was used for the irrigation of the lands of mouzah Barbua of which they held an 8-anna partitioned share. By his order, dated the 23rd December 1908, the Magistrate held that the residents of Gungapore were entitled to the flow of water from the *pyne*, and that the people of Barbua had no right to

* Criminal Revision No. 407 of 1909, against the order of H. F. Samman, District Magistrate of Monghyr, dated March 29, 1909.

(1) (1900) 5 C. W. N. 67.

(2) (1901) 5 C. W. N. 335.

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obstruct it. He accordingly ordered the *bund* to be removed, forbidding the second party from erecting any obstruction till they had obtained the decision of a competent Court adjudging them to be entitled to do so, and further directed the first party to deposit Rs. 25 for the cost of removing the *bund*, which was to be done under of the supervision of the police.

The petitioners thereupon, on the 9th January 1909, instituted a civil suit in the Court of the Subordinate Judge of Monghyr, against the first party and another, for a declaration of their right to irrigate the partitioned lands of their mouzah by erecting a *bund* across the *pyne*. On the 1st March, on the application of the plaintiffs, the Subordinate Judge, after notice to, and hearing, the defendants, granted an injunction restraining them from removing the *bund* pending the decision of the civil suit. A copy of the order was sent to the Magistrate for his information, but he, on the 19th instant, made an order directing the police to remove the *bund*, and the District Magistrate of Monghyr approved of the same on the 29th instant.

Babu Kulwant Sahai, for the opposite party. The Magistrate has jurisdiction to pass an order for the removal of a *bund*: *Pasupati Nath Bose v. Nando Lal Bose* (1) and *Lalit Chandra Neogi v. Tarini Persad Gupta* (2).

Mr. Asgur (Babu Ganendra Nath Sarkar with him), for the petitioners. The cases cited are distinguishable. The question here is whether the Magistrate had jurisdiction to direct the police to remove the *bund* after the institution of the civil suit and the issue of the injunction. Section 147 of the Code does not trench on the jurisdiction of the Civil Courts, and the injunction is binding on the second party: *In re Rahmatullah* (3), *Gopi Mohun Mullick v. Taramoni Chowdhurani* (4) and *Shurut Chunder Banerjee v. Bama Churn Mookerjee* (5).

(1) (1900) 5 C. W. N. 67.

(3) (1895) I. L. R. 17 All. 485.

(2) (1901) 5 C. W. N. 335.

(4) (1879) I. L. R. 5 Calc. 7.

(5) (1879) 4 C. L. R. 410.

CASPERSZ AND RYVES JJ. This is a Rule calling upon the District Magistrate and on the opposite party to show cause why the order of the Deputy Magistrate, dated the 19th March 1909, directing the police to see that the *bund* is removed, should not be set aside on the ground that the Deputy Magistrate had no jurisdiction to make an order, directing the *bund* to be removed by the police, within the purview of section 147 of the Criminal Procedure Code.

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We have heard the learned vakil showing cause against the Rule and the learned counsel in support of it. It appears that, on the 23rd December 1908, the Deputy Magistrate passed an order in the following terms :—"I, therefore, order that the *bund*, which is an obstruction, should be removed, and order that the second party (the petitioner) should not erect any obstruction until they obtain the decision of a competent Court adjudging them entitled to do such a thing. The first party (the opposite party in this Rule) should deposit Rs. 25 for the cost of removing the obstruction, which will be done under the supervision of the police." On the 11th of January 1909, the petitioner obtained a temporary injunction from the officiating Subordinate Judge of Monghyr restraining the defendants (the first party) from demolishing the embankment in question, and, on the 1st March 1909, that injunction was continued until further orders. The Subordinate Judge observed : "the defendants might move again when danger to their property would be imminent, and the Court might then pass necessary orders after local investigation, if necessary." A copy of this order was forwarded to the Deputy Magistrate for his information. The Deputy Magistrate, thinking that the injunction could act against the first party only, and not against the Criminal Court, and being of opinion that it was imperatively necessary that the *bund* should be removed before the rains set in, proceeded to direct the police to see the *bund* removed.

There is therefore, unfortunately, a conflict between the Civil and Criminal Courts in this respect. We, however, do not propose to travel beyond the scope of our Rule. We

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confine ourselves to decide whether the order of the Deputy Magistrate, dated the 19th March 1909, directing the police to see that the *bund* is removed, was or was not passed without jurisdiction.

The learned vakil for the opposite party relies on the case of *Pasupati Nath Bose v. Nando Lal Bose* (1), where the learned Judges held that, under section 147 of the Criminal Procedure Code, the Magistrate is competent to direct that the obstruction be removed. This case was followed in *Lalit Chandra Neogi v. Tarini Persad Gupta* (2). These cases, however, deal with directions made by a Magistrate against parties to the proceedings, and they are not authorities for the order passed on the 19th March in the present case, some seven weeks after the original order of the 23rd December 1908 disposing of the case.

We do not find in section 147 of the Criminal Procedure Code any indication that the Legislature intended the Magistrate to carry out an order under the section through the agency of the police. The section clearly contemplates orders directed to the persons who are parties to the dispute. In this view of the matter, we must discharge the order of the Deputy Magistrate, dated the 19th March 1909, and make this Rule absolute.

We may add that if the Magistrate is of opinion that the public peace will be disturbed in connection with this embankment, it will be open to him to bind down one or both of the parties under section 107 of the Criminal Procedure Code.

E. H. M.

Rule absolute.

(1) (1900) 5 C. W. N. 67.

(2) (1901) 5 C. W. N. 335.

LETTERS PATENT APPEAL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Mookerjee.*

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v.

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June 21.

Landlord and tenant—Notice to quit—Denial of landlord's title in the written statement, whether such denial makes Notice unnecessary—Reasonable Notice.

In a suit for ejectment under the Bengal Tenancy Act, a landlord is not relieved of the obligation to give notice to quit to the tenant, where the tenant for the first time denies the title of the landlord in his written statement.

The notice must be a reasonable notice, and it need not necessarily determine the tenancy at the end of the year. It will be for the final Court of fact in each case to determine what is reasonable notice having regard to all the circumstances, and whether it would not be reasonable in the circumstances of the particular case for it to determine with the year.

APPEAL under section 15 of the Letters Patent, by the plaintiff, Pratap Narain Deo.

The plaintiff brought a suit to recover possession of a mouzah after determination of a *mustagiri* lease by a notice to quit, and for recovery of arrears of rent for the years preceding the determination of the lease. Defendant, on the 4th of August 1893, executed in favour of the plaintiff a *mustagiri* lease for a term of seven years. The plaintiff stated in his plaint that, on the expiry of the lease, he served the defendant with a notice to quit, although such notice was unnecessary, and that since then the defendant had been in wrongful possession of the mouzah.

The defendant pleaded, *inter alia*, that the plaintiff had no title, that he had a permanent right in the disputed mouzah, and that in any case the suit for recovery of possession should be dismissed for want of proper notice.

The Court of first instance found the question of title in favour of the plaintiff, but dismissed the suit on the ground that no sufficient notice had been given, and also incorporated in its decree a declaration that the defendant had not a permanent

* Letters Patent Appeals Nos. 91 to 94 of 1908.

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right. On appeal, the lower Appellate Court reversed the decision of the first Court holding that the notice was sufficient.

On appeal to the High Court, Doss J., sitting alone, held that the notice given was insufficient. His Lordship dismissed the suit and, declining to go into the question of the permanency of the defendant's holding, restored the decree of the first Court.

Against this decision the plaintiff preferred the present appeal under the Letters Patent.

Dr. Rashbehary Ghose (Babu Joy Gopal Ghose with him), for the appellant. In this case the defendant is not entitled to a notice; he has set up a title to himself, and so there has been a disclaimer. Section 111 of the Transfer of Property Act (IV of 1882) supports my contention: *Kizhakkinyakath Abdulla Naha v. Karuthamakkakath Moidin Kutti* (1). A tenant, who denies the title of the landlord for the first time in his written statement in a suit for ejectment, is not entitled to a notice to quit: *Chidambaram Pillai v. Sabapathi Pillai* (2). The case of *Gopalrao Ganesh v. Kishor Kalidas* (3) also supports my contention. In this case the tenant not only says that he has a permanent right in the land, but he also denies the title of his landlord. The next question is, whether, if the tenant is entitled to a notice, the notice given is a sufficient and reasonable notice or not. On looking at the lease it appears that it is not an agricultural lease; the lease not being one for agricultural purposes, under section 106 of the Transfer of Property Act, 15 days' notice expiring with the end of a month of the tenancy is sufficient. The defendant being a middleman, and supposing Bengal Tenancy Act applies to this case, he would be entitled to a reasonable notice which has been found to be so by the lower Appellate Court: *Radha Gobind Kocr v. Rakhal Das Mukherji* (4) and *Bidhumukhi Dabea v. Kejyutullah* (5). In the present case the lease

(1) (1907) 17 Mad. L. J. 287.

(3) (1885) I. L. R. 9 Bom. 527.

(2) (1891) 1 Mad. L. J. 218.

(4) (1885) I. L. R. 12 Calc. 82.

(5) (1885) I. L. R. 12 Calc. 98.

having been granted for a term of years, and the property of the lease not being used for agricultural or manufacturing purposes, the lessee must be deemed to be a tenant from month to month, and is entitled only to a 15 days' notice to quit, expiring with the end of a month of the tenancy : *Troilokya Nath Roy v. Sarat Chandra Banerjee* (1).

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Babu Jogesh Chunder Roy (Babu Khetter Mohan Sen with him), for the respondent. The defendant is entitled to a notice. A denial in the written statement does not operate a forfeiture : *Nizamuddin v. Mamtazuddin* (2) and *Kali Krishna Tagore v. Golam Ally* (3). In order to work as a forfeiture and to absolve the landlord from giving a notice, the denial must be before the institution of the suit. Bengal Tenancy Act applies to the facts of the case ; the lease is an agricultural lease. In the case of *Umrao Bibi v. Mahomed Rojabi* (4), the distinction between the Bengal Tenancy Act and the Transfer of Property Act has been pointed out ; where the land is agricultural there the Bengal Tenancy Act applies. The case of *Troilokya Nath Roy v. Sarat Chandra Banerjee* (1) does not apply as it was one under the Transfer of Property Act. In the case of a yearly tenant six months' notice is a reasonable notice. In the cases of *Kishori Mohun Roy Chowdhry v. Nund Kumar Ghosal* (5) and *Hemangini Chowdhurani v. Sri Gobinda Chowdhury* (6) six months' notice was considered to be a sufficient notice. If the notice on the face of it is unreasonable, the Court can see whether it is so or not.

Dr. Ghosh, in reply.

JENKINS C.J. This is a suit brought to recover possession of a mouzah and for incidental relief, on the allegation that the plaintiff is the proprietor, zemindar and holder of Lachmipur estate of which this mouzah forms part. It is said that the mouzah was held by the defendant's father under several *mustagiri* settlements and has now devolved on them.

(1) (1904) I. L. R. 32 Calc. 123.

(2) (1900) I. L. R. 28 Calc. 135.

(3) (1886) I. L. R. 13 Calc. 248.

(4) (1899) I. L. R. 27 Calc. 205.

(5) (1897) I. L. R. 24 Calc. 720.

(6) (1901) I. L. R. 29 Calc. 203.

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By way of defence it is pleaded that the plaintiff has no title, that the defendants have a permanent right, and that in any case the suit for recovery of possession cannot succeed for want of proper notice. The plaintiff's title is established, and both the lower Courts have decided against the plea of permanent right. The first Court held that no sufficient notice to determine the lease had been given, and on that ground it dismissed the suit, but at the same time incorporated in its decree what in effect is a declaration that the defendants have not a permanent right. The lower Appellate Court considered that sufficient notice had been given, and therefore passed a decree in the plaintiff's favour. On appeal to the High Court, Mr. Justice Lal Mohun Doss held that the notice given was insufficient. He dismissed the suit, and declining to go into the question of the permanency of the defendants' holding, he restored the decree of the first Court. This decree was not, therefore, in conformity with his judgment, because the decree of the first Court asserted the permanent right on which the learned Judge, Mr. Justice Lal Mohun Doss, in the course of his judgment declined to decide. On appeal before us, the principal question has been as to whether notice was necessary, and if necessary, then whether proper notice had been given. It has been contended that notice was not necessary, because there was a disclaimer which relieved the plaintiff from any difficulty that he might otherwise have been under, by reason of the insufficiency of the notice. But this disclaimer on which the plaintiff relies was not prior to suit but is an inference to be drawn from what is said to be a denial of title in the written statement in this suit. Even if the written statement be treated as a denial of title, still I am of opinion that this did not relieve the plaintiff of the obligation to give notice, if notice was required. In favour of the view that there was a disclaimer which rendered notice unnecessary, reliance has been placed principally upon a decision of Sir Charles Sargent in *Gopalrao Ganesh v. Kishor Kalidas* (1). I doubt whether the point really arose in that case, for it appears from a passage

(1) (1885) I. L. R. 9 Bom. 527.

in the judgment of the Subordinate Judge, as reproduced in the report of that case, that in view of the pleadings and the conduct of the suit the defendant could not properly have been allowed to rely on the absence of notice. But in any case that decision cannot now be regarded as establishing the proposition that a denial of title made in the written statement for the first time, absolves the plaintiff from the necessity of giving notice. This, I think, is to be gathered from the subsequent decisions of the Bombay High Court. In *Purshotam Bapu v. Dattatraya Rayaji* (1), Sir Charles Sargent recognised that there were other decisions which were opposed to his determination, for in the course of his judgment he said :—"It is not necessary to express an opinion on that view of the rights of the parties in the general case, as here the defendant No. 4, who is the real defendant, having purchased the third defendant's interest, not only alleged by his written statement that his alienor was a permanent tenant, but also that the defendant No. 3 had not received legal notice to quit ; meaning, that even if he were only a yearly tenant, as alleged by the plaintiff, the latter had not given him the legal notice and could not recover in ejectment. Having thus pleaded an alternative defence, as he was entitled to do, the defendant cannot, we think, be regarded as having consented to the contract of yearly tenancy being treated as cancelled." Now, in this case there is this alternative defence, and an issue has been raised on that basis, so that it is clear that even according to Sir Charles Sargent's own decision in *Purshotam v. Dattatraya* (1), his previous decision would not aid the plaintiff's contention. The matter does not rest there. In *Vithu v. Dhondi* (2), Mr. Justice Telang puts the doctrine of disclaimer on its proper footing. He there recognises the distinction between a disclaimer operating as a waiver of the requisite notice in a tenancy determinable by notice and a disclaimer operating by way of forfeiture in the case of a lease for a fixed term ; and he goes on to decide that even if there had been any disclaimer, its occurrence after the institution of the suit would prevent the

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(1) (1886) I. L. R. 10 Bom. 669.

(2) (1899) I. L. R. 15 Bom. 497.

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plaintiff from succeeding without proof of a legal notice to quit. In *Dodhu v. Madhavrao Narayan Gadre* (1), Sir Charles Sargent recognized the authority of *Vithu v. Dhondi* (2), so that it is clear that Dr. Rashbehary Ghose's argument, so far as it is based on Sir Charles Sargent's decision in *Gopalrao Ganesh v. Kishor Kalidas* (3), has lost the foundation on which it once rested. There are cases in the Madras High Court to which our attention has been directed by Dr. Rashbehary Ghose and in particular the cases of *Chidambaram Pillai v. Sabapathi Pillai* (4) and *Kizhakkinyakath Abdulla Naha v. Karuthamakka-kath Moidin Kutti* (5). These cases, no doubt, as they stand, support the proposition for which he contends, that is to say, that a denial of title in the written statement is a sufficient waiver of notice. But the first of those cases purports to rest on Sir Charles Sargent's decision in the case of *Gopalrao Ganesh v. Kishore Kalidas* (3) and the second merely to follow the first; whereas, we find on the other hand that in a more recent decision reported in the case of *Peria Karuppan v. Subramanian Chetti* (6) a different view is taken. Turning to the Calcutta authorities we find that the cases of *Prannath Shaha v. Madhu Khulu* (7) and *Nizamuddin v. Mamtaazuddin* (8) are opposed to the plaintiff's contention in this case, though it must be conceded that the language used in the judgments in those cases does not mark the distinction between the waiver of notice in relation to a tenancy determinable by notice and the forfeiture of a lease for a fixed term. Then if we turn to the English authorities on which after all these Indian cases rest, it is clear on the authority of *Doedem. Lewis v. Cawdor* (9) that a denial of title after suit does not amount to a waiver of the notice to which the tenant is ordinarily entitled. Whether or not there can be a waiver of notice by a denial in the written statement in those tenancies to which the Transfer of Property Act applies, it is not necessary now to decide; but

(1) (1893) I. L. R. 18 Bom. 110.

(2) (1890) I. L. R. 15 Bom. 407.

(3) (1885) I. L. R. 9 Bom. 527.

(4) (1891) 1 Mad. L. J. 218.

(5) (1907) 17 Mad. L. J. 287.

(6) (1908) I. L. R. 31 Mad. 261.

(7) (1886) I. L. R. 13 Calc. 96.

(8) (1900) I. L. R. 25 Calc. 135.

(9) (1834) 1 Crompt. M. & E. 398.

the conclusion to which I now come is that the first point argued before us on behalf of the plaintiff, that is to say, that there has been a disclaimer of the plaintiff's title, which did away with the necessity of notice, fails.

The next point is as to whether sufficient notice was given. The learned Additional Subordinate Judge considered that sufficient notice was not given; the District Judge, on the other hand, thought that there had been the requisite notice. The facts are that 18 days' notice was given, and it was a notice for the determination of the tenancy neither with the year of the defendant's tenancy nor with the end of the Fusli year. In order to determine what notice would be right, we must first see what the lease was. It has been described to us by the plaintiff as a middleman's lease pure and simple. The document has been placed before us, and we are unable to accept that view. In certain aspects it must be regarded as a lease for agricultural purposes, and so it does not come within that part of section 106 of the Transfer of Property Act which provides that "a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by 15 days' notice expiring with the end of a month of the tenancy." The state of the authorities on the question of notice cannot be regarded as satisfactory; and, all that we are able to say sitting as a Division Bench is, that there must be a reasonable notice and that the notice need not necessarily determine the tenancy at the end of a year. But it will be for the final Court of fact, in each case, to determine what is reasonable notice having regard to all the circumstances, and whether it would not be reasonable in the circumstances of the particular case for it to determine with the year. Even in relation to a middleman's lease pure and simple, it has been said by Mr. Justice Norman in *Bunwaree Lall Roy v. Mohima Chunder Koonal* (1), "that the principle which applies to the case of ryats applies to the case of middlemen, and that the latter cannot be turned out by the zemindar without a reasonable notice,

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notice which we are disposed to think should expire at the end of the year." And the learned Judge gives his reasons for this view. Then there is a decision, which certainly is deserving of attention and respect, in *Kishori Mohun Roy Chowdhry v. Nund Kumar Ghosal* (1), where Sir Francis Maclean C.J. discussed the question as to the notice to which a tenant is entitled before he can be ejected. It has been said, and said truly, that the tendency of the law is to narrow the field of uncertainty, and the growth of law is towards the substitution of the fixed for the fluid. Although it cannot be said that any fixed rule has been established by the cases to which I have referred, I think they show a tendency in that direction, both as to the length of notice and the time at which the notice should expire; and the lower Appellate Court may well have regard to this tendency when it comes to determine, as it must, the question whether or not in all the circumstances of this case reasonable notice has been given—reasonable, that is to say, both in length and as to the time at which it was to come into effective operation.

There only remains one other point to be noticed, and that is the dispute between the parties as to whether the defendants had a permanent right incapable of determination by notice. The matter has been discussed in considerable detail by the first Court. Though the District Judge purports to come to the same conclusion, his treatment of the subject cannot be accepted as satisfactory or, indeed, as a compliance with section 574 of the Code of Civil Procedure. The matter in dispute is one of great importance to the parties and deserving of a far fuller discussion than the learned District Judge has bestowed upon it; and we cannot accept the few lines in which he has disposed of this part of the case, as a judgment in accordance with the law. It is true that this question of the permanency of the tenure has not been made a subject of appeal to us, but Dr. Rashbehary Ghose very properly has allowed this question to be raised as he felt that it would be merely taking advantage of a mistake—an unwitting mistake—on the part

of the learned Judge, Mr. Justice Lal Mohun Doss, if that question were not discussed here; and it is for this reason that we have gone into the question as to how far the District Judge has satisfactorily dealt with the topic of the permanency of the tenure. It is impossible for us in second appeal to deal with this matter on the materials before us. At the same time we feel that after this prolonged litigation and the expense and trouble it has involved, it would be most undesirable to shut out this question, seeing that both parties desire it to be determined in this suit.

We, therefore, reverse the judgment of Mr. Justice Lal Mohun Doss and set aside the judgment of the District Judge, and we send back the case to the lower Appellate Court in order that it may be determined, whether the permanent right pleaded and set up by the defendant has been established, and if that has not been established, then whether reasonable notice has been given entitling the Court to hold that the tenancy has been determined. Those are the only points that now remain for discussion in the case, and they must be heard and determined by the lower Appellate Court in the light of the foregoing remarks.

The costs of the High Court throughout will abide the result.

This judgment, it is conceded, will govern the other appeals Nos. 92 to 94.

MOOKERJEE J. concurred.

*Appeal allowed ;
case remanded.*

S. C. O.

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FULL BENCH.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, Mr. Justice Stephen,
Mr. Justice Mookerjee, Mr. Justice Coxe and Mr. Justice Chatterjee.*

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June 28.

BANCHHARAM MAJUMDAR

v.

ADYANATH BHATTACHARJEE.*

Debt—Succession Certificate—Succession Certificate Act (VII of 1889) s. 4.

In the case of a debt existing in the life of the creditor which did not become payable until after his death, his heirs cannot obtain a decree without the production of a certificate under the Succession Certificate Act.

Nemdhari Roy v. Bissessari Kumari (1) overruled.

REFERENCE to Full Bench.

The order of reference was as follows :—

“The facts of this case are as follows :—The defendant, Banchharam Majumdar, borrowed of Madhabananda Bhattacharjee Rs. 54 and passed to him a hand-note dated 27th Ashar 1311 (11th July 1904). It has been found, as a fact, that there was an agreement between them that the money was not to be payable until the end of Chaitra 1311. On the 31st Chaitra 1311 (13th April 1905) Madhabananda died. This suit was brought on 15th April, 1908, by the present plaintiffs Adyanath Bhattacharjee and Kuladanath Bhattacharjee as heirs of the late Madhabananda. It appears that the 13th and 14th of April 1908 were holidays, so that the suit was filed within time, if the date for payment be taken as 13th April 1905. The Munsif, exercising the powers of a Small Cause Court, passed a decree in favour of the plaintiffs. The defendant presented a petition to this Court and obtained a rule on two grounds—(i) that the suit was barred by limitation, and (ii) that the plaintiffs could not obtain a decree without a succession certificate. The Bench who disposed of that rule remanded the case to the Small Cause Court for a definite finding (which has now been arrived at) when the money was actually payable. On that turned the question of limitation, which has now been decided in the plaintiffs' favour. They, however, reserved the second question, as it was then unnecessary to decide it and it might involve a reference to a Full Bench. The contingency which their Lordships contemplated has arisen and the case has again come up to this Court on the question of the succession certificate. The plaintiffs rely upon the case of *Nemdhari Roy v. Bissessari Kumari* (1) in which it was held that the Succession Certificate Act of 1889 refers only to such debts as the deceased could sue upon, that is to say, debts actually

* Reference to a Full Bench in Civil Rule No. 929 of 1909.

(1) (1898) 2 C. W. N. 591.

falling due in his lifetime. With all respect to the learned Judges who decided that case, we are unable to agree with them on this point. There appears to be nothing in the Act itself to warrant such a limited meaning of the word "debt," while the effect of such a construction would be in many cases to defeat one of the main objects of the Act, which is to afford protection to parties paying debts to the representatives of deceased persons. The definition of the word "debt" in section 4 (2) does not, in our opinion, justify the restricted construction put upon it in the case cited. Taken, as it is, throughout the Act in conjunction with "securities" as defined in section 3 (2) there seems to be no good reason for so curtailing the ordinary meaning of the word "debt." The view taken in the case cited has been expressly dissented from by Allahabad High Court in the case of *Abdul Karim Khan v. Magbul-un-nissa Begam* (1), the *ratio decidendi* of which case commends itself to us. The case of *Ranchordas Nathubhai v. Bhagubhai Parmanandas* (2) is distinguishable. It was a suit for the rent of certain premises which was due from April 1889, the two deceased lessors having died in January 1888 and January 1889, respectively, and which, as Sir Charles Sargent C.J. said, 'formed no part of their estates at the time of their respective deaths.'

"We accordingly refer for a decision of a Full Bench the question whether, in the case of a debt payable after the death of the creditor, his heirs can sue and obtain a decree without the production of a certificate under the Succession Certificate Act (VII of 1889).

"In this case the amount at stake is small, but the question is one of very general importance, as the Act is constantly before the Courts."

Babu Brajendranath Chatterjee, for the petitioner. 'Debt' has not been defined in section 4 of the Succession Certificate Act. It must, therefore, be taken in the ordinary sense. 'His' in the section refers to *debtor*. The intention of the Legislature is apparent: see clause (2). 'Debts' include debts payable after death of creditor. In *Nemdhari Roy v. Bissessari Kumari* (3), we are not told why the learned Judges thought that the word 'debt' was not taken in the ordinary sense. From the meaning of the word in sections 1 (4), 6 (f), 9 (1), 13 (1), 16, 21 (1) and (2), etc., it is apparent the general meaning is intended: *Abdul Karim Khan v. Magbul-un-nissa Begam* (1).

Babu Pravash Chundra Mitter, for the opposite party. The word used in the Act is 'debt' and not 'claim.' 'Debt' means ascertainable claim and one that the creditor can sue for: *Booth v. Trail* (4).

(1) (1908) I. L. R. 30 All. 315.

(2) (1893) I. L. R. 18 Bom. 394.

(3) (1898) 2 C. W. N. 591.

(4) (1883) 12 Q. B. D. 8.

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[JENKINS C.J. See sections 3 (2) and 8. How, without a certificate, is a creditor to sue on a promissory note with interest ?]

Perhaps *Webb v. Stenton* (1) is in your Lordship's mind.

[JENKINS C.J. Can you say the debtor was not the debtor of the deceased ?]

Sabju Sahib v. Noordin Sahib (2) is in my favour. On the merits, the High Court should not interfere in this case.

Babu Brajendranath Chatterjee, in reply.

JENKINS C.J. The question referred for our decision is whether in the case of a debt payable after the death of the creditor, his heirs can sue and obtain a decree without the production of a certificate under the Succession Certificate Act. Although the meaning of the reference is clear, I would myself have preferred to have made it more precisely applicable to the circumstances of this case, and I think we should do that and treat the reference as though it ran in these terms, whether, in the case of a debt existing in the life of the creditor, but which did not become payable until after the death of the creditor, the heirs of the creditor can sue and obtain a decree without the production of a certificate under the Succession Certificate Act. The case is to be determined on the terms of section 4 of the Succession Certificate Act which says, no Court shall pass a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person or to any part thereof except on the production, among other things, of a certificate granted under this Act and having the debt specified therein. Had it not been that there was a previous decision of this Court to the opposite effect, I should have thought it clear beyond argument that a debt, such as is described in the reference as amended, must necessarily come within the terms of section 4, sub-section (1), clause (a). To begin with, there can be no doubt that a debt, such as is described, is a debt, for I take it to be well established that a debt is a sum of money which is now payable

(1) (1883) 11 Q. B. D. 515.

(2) (1898) I. L. R. 22 Mad. 139, 144.

or will become payable in future by reason of a present obligation. That is the definition given by Lord Justice Lindley in the case of *Webb v. Stenton* (1). Why should not the ordinary meaning of the word 'debt' be ascribed to it in section 4? I fail to see any reason. If we look at the title of the Act, the preamble and the general scope and provisions of the Act, it is clear that a present debt, though payable in future and in the circumstances actually only payable after the death of the creditor, is a debt within the terms and operation of the Act.

I, therefore, would answer the reference by saying that in my opinion in the case of a debt existing in the life of the creditor which did not become payable in the circumstances until after his death, his heirs cannot obtain a decree without the production of a certificate granted under the Succession Certificate Act, or otherwise complying with the provisions of section 4 of that Act. Having arrived at this conclusion, it only remains for us to consider how we should deal with the case. Mr. Pravash Chandra Mitter has asked us not to enforce the provisions of the Succession Certificate Act against him, and has drawn our attention to the fact that this is an application to the High Court under section 25 of the Small Cause Court Act, where interference is a matter of discretion. But this is not a matter as between the parties to the suit; it goes much further, because if the plaintiff is not compelled to take out a certificate then to the extent of that concession made in his favour, the general revenue will suffer. Perhaps it would not inflict a great loss on the country, still it would be a departure from a general principle in a wrong direction.

Therefore, we send back the case with the direction that, before a decree is passed in favour of the plaintiff, he must produce a certificate under the Succession Certificate Act or otherwise comply with its provisions. The date within which such certificate must be produced will be left to the determination of the Court against whose decision this application is made.

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We have then to deal with the costs. We think the proper order in the circumstances will be to direct that each party do bear his own costs of the High Court; and we make this concession in favour of the applicant, because he had the decision in *Nemdhari Roy v. Bissessari Kumari* (1) as a sanction for the line pursued by him. The costs before the lower Court will follow the result. The costs of the High Court will be confined to the present Rule, and we do not interfere with any previous order as to costs made by the High Court.

STEPHEN J. I agree.

MOOKERJEE J. I agree entirely in the order which the learned Chief Justice proposes to make in this case.

The short question for decision is, whether the term 'debt' in section 4 of the Succession Certificate Act has a restricted meaning as contended by the plaintiff and as held by this Court in the case of *Nemdhari Roy v. Bissessari Kumari* (1), or whether it has its ordinary legal meaning as contended by the defendant and as held by the learned Judges of the Allahabad High Court in *Abdul Karim Khan v. Maqbul-un-nissa Begam* (2). Now there can be no doubt that the word 'debt' in its ordinary legal acceptation means a debt either owing, or accruing, or, as put in the case of *Webb v. Stenton* (3), it is either a sum of money now payable or a sum of money which will become payable in the future by reason of a present obligation. This view appears to have been taken by the Judicial Committee in the case of *Syud Tuffuzzool Hossein Khan v. Rughoonath Pershad* (4), where Lord Justice James describes a debt which was payable at a future day as an existing debt capable of attachment, whilst a salary, wages, or money claim accruing due was not so liable to attachment. In other words, the term debt includes both present debt and future debt, as observed by Blackburn J. in *Tapp v. Jones* (5), where an

(1) (1898) 2 C. W. N. 591.

(3) (1883) 11 Q. B. D. 512.

(2) (1908) I. L. R. 30 All. 315.

(4) (1871) 14 Moo. I. A. 40.

(5) (1875) L. R. 10 Q. B. 591.

actually existing debt payable by instalments not yet due, was treated as an accruing debt,—a view difficult to reconcile with the reasoning in *Pyne v. Kinna* (1), that money secured by a current promissory note is not attachable as an accruing debt. The view that the term debt ordinarily includes both debts owing and accruing appears to have been affirmed in the recent case of *Edmunds v. Edmunds* (2), where reference is made to the decision of Chief Baron Pigot in *Sparks v. Younge* (3), to the effect that money not payable until a future date is a debt, and does not lose its character of a debt, because of the possibility that a future state of things may intervene before the day assigned for payment and may thus create a valid defence against the recovery of the debt; in other words, a debt is no less a debt because it has not yet matured, if it will certainly become payable in the future.

The principle applicable to cases of this description is thus concisely stated in the judgment of the Supreme Court of California in *People v. Arguello* (4). “Standing alone, the word ‘debt’ is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. If we wish to distinguish between the two, we say of the former that it is a debt owing, and of the latter that it is a debt due. In other words, debts are of two kinds: *solvendum in presenti* and *solvendum in futuro*. Whether a claim or demand is a debt or not, is in no respect determined by a reference to the time of payment. A sum of money which is certainly and in all events payable is a debt, without regard to the fact whether it be payable now or at a future time. A sum payable upon a contingency, however, is not a debt, or does not become a debt until the contingency has happened.” Tested in the light of this principle, there can be no question that the decision of this Court in the case of *Nemdhari Roy v. Bissessari Kumari* (5) is erroneous. Some reliance was placed by the learned vakil for the plaintiff upon the decision of the Madras

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(1) (1877) I. R. 11 C. L. 40.

(3) (1858) Ir. 8 C. L. 251.

(2) [1904] P. 362.

(4) (1869) 37 Calif 524.

(5) (1898) 2 C. W. N. 591.

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High Court in the case of *Sabju Sahib v. Noordin Sahib* (1), followed by this Court in *Bissessar Roy v. Durgadas Mehara* (2), in which it was ruled that a suit for account by the representatives of a deceased partner against another partner is not a suit for debt within the meaning of the Succession Certificate Act. The reason for that decision is stated to be that such amount is not liquidated; clearly that does not affect the decision of the question raised before us. Nor is the view now taken by this Court opposed to the decision of Sir Charles Sargent C.J. in *Ranchordas Nathubhai v. Bhagubhai Parmanandas* (3), mentioned in the order of reference to the Full Bench. The principle of that case is identical with that of *Jones v. Thompson* (4) where Mr. Justice Crompton held that rent not yet due is not an existing debt, and cannot, therefore, be described as a debt accruing.

In my opinion, the view taken by the learned Judges of the Allahabad High Court in *Abdul Karim Khan v. Magbul-un-nissa Begam* (5) is clearly well-founded on principle and the view of this Court in *Nemdhari Roy v. Bissessari Kumari* (6) cannot be supported.

COXE J. I agree.

CHATTERJEE J. I agree.

S. M.

(1) (1898) I. L. R. 22 Mad. 139.

(2) (1905) I. L. R. 32 Calc. 418.

(3) (1893) I. L. R. 18 Bom. 394.

(4) (1858) 1 El. B. & E. 63.

(5) (1908) I. L. R. 30 All. 315.

(6) (1898) 2 C. W. N. 591.

PRIVY COUNCIL.

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[On appeal from the High Court at Fort William in Bengal.]

Hindu law—Maintenance—Grant to junior members of family for Maintenance—“ Babuana ” property, nature of—Power of Grantees to alienate—Custom of Darbhanga Raj—Property not inalienable merely because it is impartible—Liability of “ Babuana ” to sale in execution of decree—Evidence of Custom.

Property granted as “ *babuana* ” to a junior male member of the Darbhanga Raj family in lieu of money maintenance was admittedly impartible, descending to the eldest male heirs of the grantee and being held and managed by the person to whom it descended for the maintenance of himself and his family. The Government revenue was conditioned to be paid by the grantee, or the person to whom the property descended, not directly to Government but through the Maharaja :—

Held, that such property, though impartible, was not by reason of that fact inalienable. Property so granted may be alienable.

Udaya Aditya Deb v. Jadablal Aditya Deb (1), *Sartaj Kuari v. Deoraj Kuari* (2), and *Venkata Surya Mahipati Rama Krishna Rao v. Court of Wards* (3) followed.

Notwithstanding its impartibility the subject of such a grant came, in the absence of any special custom regulating its enjoyment within the principle laid down in *Manu's Hindu Law*, 7th edition, page 415, paragraph 321, that “ in cases governed by the Mitakshara Law a father may sell or mortgage, not only his own property in order to satisfy an antecedent debt of his own, not being of an illegal or immoral character . . . and such transactions may be enforced against his sons by a suit, and by proceedings in execution to which they are no parties.”

* *Present* : LORD MACNAGHTEN, LORD ATKINSON, LORD COLLINS, and SIR ANDREW SCOBLE.

(1) (1881) I. L. R. 8 Calc. 199 ; (2) (1888) I. L. R. 10 All. 272, 288, 289 ;
L. R. 8 I. A. 248. L. R. 15 I. A. 51, 65, 66.

(3) (1899) I. L. R. 22 Mad. 383 ; L. R. 26 I. A. 83.

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Semble : If the male descendant in whom property so granted was for the time being vested failed to pay the Government revenue as stipulated, and the Maharaja was himself obliged to discharge the claim of the Government, he might sue the defaulter for the amount so paid, and execute his decree by sale of the "*babuana*" property.

A family custom to the effect that property granted for maintenance by a "*babuana*" grant was inalienable, was held to be not established.

Absence of evidence of alienation without any evidence of facts which would make it probable that an alienation would have been made, cannot be accepted as proof of a custom of alienability.

Sartaj Kuari v. Deoraj Kuari (1) followed.

Two consolidated appeals (Nos. 10 and 11 of 1908) from two judgments and decrees (10th April 1905) of the High Court at Calcutta, one of which (the subject of appeal No. 10) affirmed a judgment and decree (29th March 1901) of the Subordinate Judge of Mozufferpur ; and the other (the subject of appeal No. 11) reversed a judgment and decree (13th July 1903) of the second Subordinate Judge of the same Court.

In the first appeal (No. 10) the defendants, and in the second appeal (No. 11) one of the plaintiffs were respectively appellants to His Majesty in Council.

Appeal No. 10 arose out of a suit (114 of 1899) which was brought on 14th December of that year by the present respondent, the Maharaja of Darbhanga, to enforce a mortgage deed, dated 14th April 1892, executed by the appellant, Durgadut Singh, whereby the latter mortgaged the share of himself and his family in certain villages in pergunnah Jabdi. On that mortgage deed the mortgagee had, on 11th February 1895 and 21st August 1896 respectively, obtained two decrees against the mortgagor, his sons and grandson (now appellants) for arrears of interest due on the mortgage, and the amount decreed in each case was declared to be a charge on the property mortgaged.

Appeal No. 11 was preferred in a suit (89 of 1901) brought on 14th August of that year, in which the plaintiffs (who were minors) were the fifth son of Durgadut Singh, one Jibender Singh (now deceased), and the present appellant Taradut Singh

(1) (1888) I. L. R. 10 All. 272, 289 ; L. R. 15 I. A. 51, 65.

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(a grandson of Durgadut Singh), who sued by his mother as next friend; and the defendants were the present respondent, Rameshwar Singh, and Durgadut Singh and his four other sons. Of the defendants, however, only Durgadut Singh and the present respondent appeared and contested the suit, in which the plaintiff prayed that the decrees of 11th February 1895 and 21st August 1896 should be set aside on the ground of the negligence of the persons who acted as their guardians in those suits, and also for a declaration that the mortgage of 14th April 1892 was invalid on the ground that the mortgaged property being *bahu-ana* given for maintenance was not alienable.

This latter contention formed the main question for determination in the present appeals.

The appeal to the High Court in the suit, out of which appeal No. 11 arose, will be found reported as *Rameshwar Singh v. Jibender Singh* (1), where the facts are sufficiently stated as well as in their Lordships' judgment on these appeals. In that appeal the decision of the Subordinate Judge that the property was inalienable was reversed by the High Court (RAMPINI and CASPERSZ JJ).

In the suit to enforce the mortgage deed (the subject of the present appeal No. 10) the same contention was raised by the defendants. The Subordinate Judge held (*inter alia*) that there was nothing to show that the property was inalienable, and gave the plaintiff (the present respondent) a decree. The appeal to the High Court in this case was heard by the same Judges and together with the appeal in the other suit, but a separate judgment was delivered, the material portion of which as to the alienability of the property was as follows :—

“The defendant No. 1, Durgadut Singh, is one of the relatives of the plaintiff. He is the grandson of the common ancestor Maharaja Madho Singh. His case is that Maharaja Madho Singh when abdicating in favour of his eldest son, Chhattar Singh, made a grant in favour of his younger son, the defendant No. 1's father, Babu Kirat Singh, of certain properties for the maintenance of himself and his male descendants. Now, the contention of the appellant is, that such property being for maintenance is inalienable. But, unfortunately, there is no evidence either documentary or oral to prove this contention.

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There was admittedly a deed granting the *babuana* properties in dispute to Kirat Singh, but it is not produced. It is further admitted that there is a copy of this grant in existence, but it has not been produced. The only document that has been put before us is a sanad granted by Maharaja Madho Singh to Chhattar Singh on the 18th June 1807, which contains the recital that 'a sanad in respect of pergunnah Jabdi has already been granted to Maharaj-kumar Babu Kirat Singh.' This is all.

"From these words we are asked to reconstruct the grant in favour of Babu Kirat Singh and to construe it as containing a condition to the effect that the property was inalienable for ever. We are unable to do this. From the evidence of the Maharaja and other members of the family, it appears to us to be clear that *babuana* property was subject to three conditions: (i) that the Maharaja for the time being remained the recorded proprietor of it; (ii) that the Government revenue was paid through the Maharaja; (iii) that, on failure of male issue of the grantee, the property reverted to the Maharaja. But there is no evidence nor any *data*, from which we can infer that the property was inalienable during the continuance of the lines of the grantee and of his male issue. Such property might be inalienable according to family custom, but there is no evidence, far less proof, of any such custom prevailing in this suit.

"It is also very much against the hypothesis of the property being inalienable that this plea was not raised in either of the previous suits, or by the defendant No. 1 himself in his written statement in this suit.

"On his own showing, the defendant No. 1 was willing to transfer the property by means of a usufructuary mortgage transaction, and if he was competent to deal with it in any one way, the theory of a limited estate must disappear. It is, also, worthy of note that Government revenue paid by the Maharaja can be realized by suit from the holder of *babuana*, whose property would then become liable to be sold in execution of the decree so obtained.

"It also appears to us that the remote contingent interest reserved to the Maharaja cannot detract from what is, virtually, an absolute estate of the grantee and his male descendants, among whom may be reckoned adopted sons. We are, therefore, unable to recognize in these Babuana-holders, the status of protected proprietors who may not contract debts affecting their landed property. Again, in the bond in suit there is a clear declaration by the defendant No. 1, that—'I, the declarant, my present and future heirs and representatives, have a full joint *milkiat* right in them (the mortgaged properties).' The word *milkiat* means, of course, the interest of a *malik*, or proprietor, and this, it seems to us, was all along the view taken by the defendants of their rights under the grant of *babuana*."

The High Court, therefore, dismissed the appeal.

On these appeals,

J. A. Simon, K.C., and G. E. A. Ross, for the appellants in both appeals, contended that on the construction of the grant, the property being *babuana* was not alienable. The nature

of the grant and its object and intention were to be looked at. Here the object of the grant was to make sufficient provision for the grantee and the male members of his family to enable them to maintain their status as Maharaj Kumars or Babus. If the property granted were liable to alienation the very object of the grant would be defeated ; it could not have been the intention of the grantor that that should happen. The Government revenue on the property granted for *babuana* was to be paid by the grantee, not directly to the Collectorate but through the Maharaja, the grantor, by which restriction, it was submitted, it was intended that the subject of the grant was to remain in the grantor, the grantees only getting the benefit of the usufruct for maintenance. From the nature of the grant it was meant to be inalienable by the grantee. If the subject of the grant were alienable, and alienation was made of it so as to greatly reduce, or wholly extinguish, the provision made for the maintenance of the members of the branch of the family to which the grant was made, the burden of maintaining them would, inasmuch as they were entitled to be suitably maintained, be thrown again on the grantor, which could never have been his intention. The impartibility of the property would be also in favour of its being inalienable. [LORD MACNAGHTEN referred to *Udaya Aditya Deb v. Jadab Lal Aditya Deb* (1).] Reference was made to *Gunesh Dutt Singh v. Moheshwar Singh* (2), a case recording a previous litigation in the family to which the present parties belonged, where the assignment of the Raj to the eldest son was only allowed "on condition of provision being made for the younger sons." It was submitted, therefore, that the incidents of the property were of such a nature that the holders thereof for the time being could not have absolute and transferable rights and interests therein which they could sell or mortgage : and Transfer of Property Act (IV of 1882) section 88 ; Mayne's Hindu Law, 7th edition, page 524, paragraph 395 ; *Rameshar Bakhsh Singh v. Arjun Singh* (3),

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(2) (1855) 6 Moo. I. A. 164.

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Karim Nensey v. Heinrichs (1) and *Aziz-un-nissa v. Tasaddug Husain Khan* (2) were referred to.

It was then contended on the evidence that a custom existed in the family that in such grants the subject of the grant was inalienable ; there was a contract as it were that the property should not be alienated, and for a long period it was never alienated.

Sir R. Finlay, K.C., DeGruyther, K.C., and E. U. Eddis, for the respondent, contended that the property was alienable. Impartible property was not inalienable in virtue of its impartibility : *Venkata Surya Mahipati Rama Krishna Rao v. Court of Wards* (3). In the absence of any restriction on alienation, the property must be assumed to be alienable. No intention to restrain alienation was shown by the mode of payment by the grantee of the Government revenue ; if the condition for payment were not fulfilled, and it remained unpaid, and the grantor had to pay it to the Government, he could sue the person for the time being in possession of the subject of the grant for the share of the revenue which had not been paid, and execute any decree he obtained by sale of the property granted for maintenance. But, if any restraint on alienations had been intended, it would have been void as creating a perpetuity ; an estate tail was illegal under the Hindu Law : *Tagore v. Tagore* (4), *Raikishori Dasi v. Debendranath Sircar* (5), and Transfer of Property Act (IV of 1882) section 10, were referred to : and reference was made to Mayne's Hindu Law, 17th edition, page 415, paragraph 321, as to the power of alienation by the father of a Hindu joint family, the principles of which would, it was submitted, apply to the present case. No custom of inalienability was proved : the fact that there was no alienation for a long time proved nothing except that there was probably no occasion for it ; certainly it did not show a

(1) (1901) I. L. R. 25 Bom. 563 ; (4) (1872) L. R. I. A. Sup. Vol.
L. R. 28 I. A. 198. 47, 54, 66, 67, 70 ;

(2) (1901) I. L. R. 23 All. 324 ; 9 B. L. R. 377, 396.
L. R. 28 I. A. 65.

(3) (1899) I. L. R. 25 Mad. 383 ; (5) (1887) I. L. R. 15 Calc. 409 ;
L. R. 15 I. A. 37.
L. R. 26 I. A. 83.

custom that the property was inalienable. The evidence was gone into to show that there had been alienations of the property, and that they had been made without any objection ever being taken as to the inalienability of the property.

J. A. Simon, K.C., in reply. The analogy drawn between an estate in tail and such an estate as that in suit was not accurate; the former could be barred, but the *babuana* grant could not be.

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The judgment of their Lordships was delivered by

LORD ATKINSON. In this litigation two appeals, numbered 10 and 11 of 1908, and subsequently consolidated, have been lodged against two decrees of the High Court of Calcutta, both dated the 10th April, 1905.

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The first decree, in Appeal No. 10 of 1908, affirmed a decree of the Subordinate Judge of Mozufferpur, dated the 29th March, 1901, pronounced in a suit, No. 114 of 1899, brought by Maharaja Sir Rameshwar Singh Bahadur (hereinafter called the mortgagee) against Durgadut Singh (hereinafter called the mortgagor) and others to enforce a mortgage, dated the 14th April, 1892, described therein, of a certain pergunnah named Jabdi.

The second decree, in appeal No. 11 of 1908, reversed a decree of another Subordinate Judge of Mozufferpur, dated the 13th July, 1903, pronounced in a suit, No. 89 of 1901, instituted by Taradut Singh, the grandson of the mortgagor, a minor, through his mother, his guardian and next friend, against the mortgagee, the mortgagor (his grandfather), and others, to have it declared that the said mortgage was void and that the two decrees based upon it hereinafter mentioned should be cancelled.

The mortgage was given for the large sum of Rs. 4,70,858 8a. 5½p., repayable on the 15th April, 1897. It reserved interest at the rate of 10 per cent. per annum, payable on the 15th April in each year. Compound interest at the same rate was to be charged in case of default in the payment of the

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interest on the days named, and a right was given to the mortgagee to sue for arrears of interest as they became due. A considerable portion of the sum secured was paid in cash to the mortgagor, who was then heavily indebted, and the balance was paid to his creditors. The interest having fallen into arrear, the mortgagee, on the 31st July, 1894, instituted a suit in the Court of the Subordinate Judge of Mozufferpur against the mortgagor and all the members of the family of which he was the head, two of whom were minors, to recover interest and compound interest due on the mortgage from the 14th April, 1892, to the 15th April, 1894. Of all the members of the family made defendants the two minors alone appeared and pleaded to the effect that the mortgage was unconscionable, that it was not executed for necessity, and that their shares in the pergunnah as joint Hindu property should be released.

The Subordinate Judge found in favour of the plaintiff in the suit on the issues raised on these pleas, and on the 11th February, 1895, gave a decree for the amount sued for.

The interest due on the 15th April, 1895, having fallen into arrear, the mortgagee, on the 12th September, 1895, again instituted a suit in the same Court against the same parties to recover the arrears. The same defendants appeared and pleaded the same pleas with the same result, that the Subordinate Judge found in favour of the plaintiff, the mortgagee, and on the 21st April, 1896, gave a decree for the amount claimed.

The suit out of which the first of the present appeals arises was instituted on the 14th December, 1899, by the mortgagee in the same Court against the same parties to recover the sum due upon the mortgage for principal and interest by sale of the mortgaged property. Several defences were put in by the different defendants, not only raising the issues already decided upon in the two previous suits, but raising, for the first time, the issue upon which the decision of these appeals mainly, if not entirely, turns, and to which the arguments addressed to their Lordships on behalf of the parties on both sides were chiefly directed, namely, whether the fact that the grant of the

pergunnah Jabdi, made originally in 1807 by the then head of the family, Maharaja Madho Singh, to his son, Kirat Singh, was admittedly a *babuana* grant—that is, a grant for the maintenance of the grantee and his family, descendible to his male descendants—rendered the property inalienable by the mortgagor, Durgadut Singh, the son of the original grantee, to whom it had descended, and the mortgage therefore void. The Subordinate Judge delivered his judgment on the 29th March, 1901, holding that, notwithstanding the fact that the grant was a *babuana* grant, the property was alienable, and the mortgage therefore valid. And the High Court, by their decree of the 10th April, 1905, upheld that decision.

The second suit was instituted on the 14th August, 1901, about five months after the date of the decree of the Subordinate Judge in the former suit against the mortgagor and mortgagee and others. It claimed, amongst other things, to have it declared that the mortgage of the 14th April, 1892, and also the two decrees of the 11th February, 1895, and 21st April, 1896, were invalid and ineffectual, and that the decrees should be set aside; and also that the sale in execution of these decrees of certain properties, mentioned in the schedule No. 2 attached to the plaint, should be set aside, and that the plaintiffs should obtain a decree for possession of the same. The fundamental ground on which the claim to this relief was based is set forth in paragraph 4 of the plaint in these words:—

4. That the said pergunnah Jabdi which was given as '*babuana*' grant was given for maintenance of Maharajkumar Babu Kirat Singh and his male descendants; and the said Maharajkumar Babu Kirat Singh or any of his male descendants had no right to transfer it; but nothing whatever is alleged in the plaint as to whether this inalienability is one of the incidents attaching to all *babuana* grants of this kind, or is only attached to this particular *babuana* grant by virtue of some custom prevailing in the family or tribe to which all the parties concerned belong.

Neither the grant by the Maharaja Madho Singh, the head of the family, to his son, Kirit or Kirat Singh, nor a copy of it was produced, but an attested copy of a sanad dated the 13th Jeth Sudi, 1214 (8th June, 1807) granted by the Maharaja to

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his eldest son and successor Sri Chhatar Singh, was produced. It contains the following statement or recital :—

A sanad in respect of pergunnah Jabdi has been already granted to Maharajkumar Babu Kirat Singh, in respect of pergunnah Pariharpur Ragho, to Maharajkumar Babu Gobind Singh, in respect of pergunnah Pachahi to Maharajkumar Babu Ramapat Singh, giving the same to them for their maintenance as *babuana* grants. Two horses and one elephant for riding have been given to each. The said Maharajkumar the Babus will enjoy the *malikana dastur* and profits of the said pergunnahs. They will continue to pay the Government revenue of the said pergunnahs to you and you will pay into the Collectorate the same together with the Government revenue of the Raj. The said Babus will attend upon you properly and you will treat them as Babus.

It was conceded that the lands, or usufructs, granted by this *babuana* grant to Kirat Singh, the father of Durgadut Singh, were impartible—descending to the eldest male heirs of the grantee to be held, or managed, by the person to whom they descend for the maintenance of the family—and that, on failure of male descendants, they reverted to the Raj and became the property of the Maharaja for the time being, or that the interest granted then ceased to exist, whatever it might be ; and, further, that meanwhile the Government revenue should be paid by the grantee, or the person to whom the property should descend through the Maharaja. There is no provision, express or implied, that the interest granted should be inalienable. It is no doubt impartible—that is to say, those who for the time being are entitled to be maintained out of it cannot have it divided amongst them by proceedings in the nature of partition. It by no means follows, however, that it is, by reason of this fact, inalienable: *Udaya Aditya Deb v. Jadablal Aditya Deb* (1), *Sartaj Kuari v. Deoraj Kuari* (2) and *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao v. The Court of Wards* (3). On the contrary, these authorities establish that property, though impartible, may be alienable. In the present case it was almost, if not entirely, conceded by the appellant's counsel, indeed it could not be successfully disputed, that, if the male

(1) (1881) I. L. R. 8 Calc. 199 ;
 L. R. 8 I. A. 248.

(2) (1888) I. L. R. 10 All. 272, 288, 289 ;
 L. R. 15 I. A. 51, 65, 66.

(3) (1899) I. L. R. 22 Mad. 383 ; L. R. 26 I. A. 83.

descendant in whom the property or interest granted was for the time being vested failed to pay the stipulated Government revenue to the Maharaja for the time being, and the latter was himself obliged to discharge the claim of the Government, he might sue the former for the amount so paid, and, if necessary, recover the amount decreed to him by sale of the interest granted for maintenance, since it never could be permitted that the subject of the grant should be enjoyed and the condition upon which it was made disregarded.

But an involuntary alienation of this kind, brought about by the default of the person in whom the property or interest was for the time being vested, would as effectually defeat the claims of all the members of the family who were at the time, or might thereafter become, entitled to maintenance out of this property or interest as would any voluntary alienation of it. Yet the main contention of Mr. Simon, on behalf of the appellants, was, as their Lordships understood it, this, that every member of a family of which a Maharaja, as owner of a Raj, was the head had such an inextinguishable right to maintenance out of the Raj that, if the property or interest, the subject of a *babuana* grant, made, as in the present case, for the maintenance of a particular branch of the family, was permitted to be alienated, the right to maintenance of the present and prospective members of that branch against the Raj would revive *toties quoties*, which would be most unjust and oppressive to the owner of the Raj, and destructive or injurious to the rights of the members of all the other branches; but no authority in support of this theory as to the peculiar nature of the right to maintenance was cited, and those above mentioned refute it.

The result of the authorities as to the right to alienate is thus summed up in Mayne's Hindu Law (7th edition, page 415) :—

In cases governed by the Mitakshara law, a father may sell or mortgage not only his own share but his sons' shares in family property, in order to satisfy an antecedent debt of his own, not being of an illegal or immoral character, and . . . such transaction may be enforced against his sons by a suit and by proceedings in execution to which they are no parties.

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Notwithstanding the impartibility of property granted by a *babuana* grant, it comes apparently, in the absence of some special family custom regulating its enjoyment, within this principle. Pressed by this state of the law, the appellants endeavoured to prove the existence, in the family to which the parties on both sides belonged, of a family custom to the effect that property granted for maintenance by a *babuana* grant, such as that proved in this case, was inalienable. It is not necessary for their Lordships to express any opinion as to the legal validity of a custom such as is suggested, tying up, as it would, property for, possibly, many generations, because they are clearly of opinion that, not only have the appellants failed to prove the existence of this custom, but that the only evidence given in reference to dealings with the estate disproves it.

“The absence of evidence of an alienation, without any evidence of facts which would make it probable that an alienation would have been made, cannot be accepted as proof of a custom of inalienability”: *Sartaj Kuari v. Deoraj Kuari* (1). But in this case numerous instances were proved in which alienations of small portions of the property took place, and in not a single instance was it proved that any objection, based upon the alleged custom, was raised by any one to an actual, or threatened, alienation. It was raised in the present suits for the first time.

Their Lordships are, therefore, clearly of opinion that both the decrees of the High Court were right, and should be affirmed, and that both appeals should be dismissed, and they will humbly advise His Majesty accordingly.

The appellants must pay the mortgagee's costs of the appeals.

Appeals dismissed.

Solicitors for the appellants: *Downer & Johnson.*

Solicitors for the respondent: *Sanderson, Adkin, Lee & Eddis.*

(1) (1888) I. L. R. 10 All. 272, 289; L. R. 15 I. A. 51, 66.

APPELLATE CRIMINAL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Caspersz.

JYOTISH CHANDRA MUKERJEE

v.

EMPEROR.*

1909

June 30.

Forgery—Dishonestly using as genuine Forged Documents—Falsification of Accounts—Alteration of Accounts—Indian Penal Code (Act XLV of 1860) ss. 465, 471, 477A—Reading over Deposition to witness in the presence of the Accused or his Pleader—Criminal Procedure Code (Act V of 1898) s. 360—Practice.

The alteration of accounts so as to show the receipt of a sum of money criminally misappropriated and in order to remove evidence of such misappropriation, is not an offence either under s. 465 or s. 477A of the Penal Code, there being no intent to commit fraud.

Lalit Mohan Sarkar v. Queen-Empress (1) and *Emperor v. Rash Behari Das* (2) distinguished.

Whether or not there is an intent to defraud in any particular case depends on the circumstances of the case.

Section 360 of the Criminal Procedure Code is mandatory. The evidence given by a witness must be read over to him in the presence of the accused or his pleader, and no practice to the contrary can alter the plain words of the law.

THE appellants, Krishna Gopal Sen and Jyotish Chandra Mukerjee, who were postmaster and treasurer, respectively, of the Bankura Head Post Office, were tried before Mr. E. E. Forrester, Additional Sessions Judge of Bankura, with the aid of assessors, the first under sections 409, 465, 471 and 477A of the Penal Code for criminal breach of trust of Rs. 10 and alteration of certain account books and papers in connection therewith, and the second under sections 465, 471 and 471A, in respect of the same documents. The Judge, differing from the assessors, found the appellants guilty, and sentenced the postmaster to

* Criminal Appeals Nos. 494 and 514 of 1909, against the orders of E. E. Forrester, Additional Sessions Judge of Bankura, dated May 18, 1909.

(1) (1894) I. L. R. 22 Calc. 313.

(2) (1908) I. L. R. 35 Calc. 450.

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three months' rigorous imprisonment under section 409 and to two years' rigorous imprisonment under section 465, and the treasurer to 18 months' similar imprisonment under section 465 : no sentences under sections 471 and 477A being passed against either. They preferred separate appeals which were numbered 494 and 514 respectively.

The system of accounts in vogue at the Bankura Head Post Office was as follows. The treasurer kept the cash and the books of account. Each receipt and disbursement was entered by him, as it occurred, in the cash book. At the end of the day he prepared a summary showing the total of all receipts and disbursements. The balance was then struck in both the cash and summary books. It was the duty of the postmaster to compare the books with the actual cash balances, and both he and the treasurer signed the accounts in token of their correctness. The case for the prosecution was, that on the 11th January 1909, four sacks of waste-paper forms of the Post Office, kept in the custody of the postmaster, were despatched by him through a village postman by rail to one Hari Lal of Krishnagar. This fact was discovered during the visit of the Postmaster-General of Bengal to Bankura, and an inquiry was set on foot. It was alleged that the accused postmaster, in order to cover his failure to credit the proceeds of the sale of the waste paper which amounted to Rs. 10, on the 28th January, with the help of the treasurer, changed the accounts of the dates between the 12th and the 28th instant. The latter re-wrote the cash book (Ex. 7) and the summary (Ex. 4) for the period covered by these dates. In the former, there now appeared under the date 12th January, a credit entry of Rs. 10 for "waste paper," and in the latter a corresponding entry under the head of "miscellaneous receipts," which entries were not found in the genuine books. The cash book and the summary, as re-written, purported to be contemporaneous accounts, and were signed by both the accused. They were produced by the appellant Jyotish before the sub-divisional Superintendent of Post Offices during the investigation in the matter of the sale of the bags of waste paper.

Mr. P. Mitter and Babu Manmatha Nath Mukerjee, for the appellant Krishna Gopal Sen, in Criminal Appeal No. 494.

Babu Khetter Mohun Sen, for the appellant Jyotish Chandra Mukerjee, in Criminal Appeal No. 514.

Mr. Morton, for the Crown in both the appeals.

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JENKINS C.J. These are two separate appeals preferred by two accused who have been convicted and sentenced at the Bankura Sessions. The accused in appeal No. 494 has been convicted under sections 409, 465, 471 and 477A, and he has been sentenced to three months' rigorous imprisonment for the offence under section 409, and to two years' rigorous imprisonment under section 465, of the Indian Penal Code. The accused in appeal No. 514 has been convicted under sections 465, 471 and 477A, and he has been sentenced to one year and six months' rigorous imprisonment under section 465. That the accused in appeal No. 494 is guilty of the offence under section 409 is, we think, clearly established. The judgment of the learned Judge on this part of the case is very careful, and his reasoning convinces us that his conclusion is correct. We, therefore, must affirm the conviction and sentence under section 409. But we are unable to uphold the conviction and sentence under the other sections against this accused. Section 465 prescribes the punishment for forgery ; section 471, the punishment for using as genuine a forged document, and section 477A for falsification of accounts. For each one of these offences there has to be, so far as this case is concerned, an intent to commit fraud ; and, on the facts that are established, it cannot be said that this intent is made out. The intent to commit fraud is said to consist in the preparation of certain books with a view to showing that the sum of Rs. 10, which had been misappropriated by the postmaster, in fact was received on the 12th of January, whereas the proper accounts did not show that that sum was paid. Looking at the case in its broad features, the real purpose was not to defraud but to remove the evidences of crime. For that no charge has been framed as against the accused. It would apparently be, if at all, under

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section 201 that such a charge could be framed ; and, as against the accused postmaster, no such charge would lie, as it has been decided more than once that a charge against a principal offender will not lie under that section, nor has there been any charge against the accused treasurer under that section. As to whether or not there is an intent to defraud in any particular case manifestly must depend on the actual circumstances of that case : and the facts now before us are distinguishable from those in *Lolit Mohan Sarkar v. Queen-Empress* (1) and *Emperor v. Rash Behari Das* (2), in that here the entry shows that the postmaster was liable, and it is a statement of the true position of affairs, whereas in those cases the accounts were framed in such a way as to conceal liability and to present an untrue state of affairs : and, this having been put to the learned counsel on behalf of the Crown, he was compelled to concede that it would be difficult for the Crown in these circumstances to say that the intent to defraud in its true legal significance had been made out. In our opinion, the learned counsel was perfectly right in the view he took, and we agree with that view. The charges, therefore, so far as they rest on an intent to defraud, *i.e.*, the charges under sections 465, 471 and 477A, fail with the result that, as against the postmaster and also as against the treasurer, the conviction and sentence under these sections must be set aside.

The result, therefore, is that the conviction and sentence of the accused in No. 494, the postmaster, under section 409 is affirmed, but his conviction and sentence under the other sections are set aside ; and the treasurer, the accused in No. 514, is acquitted, and we direct his release.

There is one further point to which I would draw attention, and it is a matter of procedure in regard to the reading over of depositions as required by section 360 of the Criminal Procedure Code. In the course of the trial, Mr. Morton on behalf of the Crown asked that the evidence given by a witness should be read over to him in the presence of the accused or his pleader as provided by section 360. To this the learned Judge replied

(1) (1894) I. L. R. 22 Calc. 313.

(2) (1908) I. L. R. 35 Calc. 450.

that it would involve a great waste of time. He then said "the section seems to me directory and not obligatory. If the witness detects a mistake he can come back and say so. This is the universal practice in Sessions Courts: my experience extending to about six such Courts. *Optima est legum interpretatio consuetudo.*" I do not agree with this view, for the custom indicated by the learned Judge cannot alter the plain words of the Act. Mr. Morton's application was right, and if, as has been represented to us, that section is disregarded in practice, then I have no hesitation in saying that the practice is erroneous. It has not interfered with our disposal of this case, because we are able to hold, in the special circumstances, that the omission is not fatal. But such a departure from the terms of the Criminal Procedure Code might lead to considerable embarrassment, and place a serious impediment in the proper administration of justice, for there are cases in which it has been held that, for the purposes of a prosecution on the ground of perjury, depositions to which the procedure laid down in section 360 has not been applied, cannot be properly used. I, therefore, trust that, if the practice exists, it will be discontinued in deference to the clear direction of section 360 of the Criminal Procedure Code.

CASPERSZ J. I agree.

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CIVIL RULE.

Before Mr. Justice Sharfuddin and Mr. Justice Richardson.

1909
July 9.

SINGER MANUFACTURING COMPANY

v.

RAJA PROSAD.*

*Penalty—Agreement to pay a sum certain, breach of—Deposit, forfeiture of—
Forfeiture, no relief against, if amount reasonable—Contract Act (IX of 1872)
s. 74.*

Where there is a stipulation to deposit a sum specified as security for performance of an agreement, the forfeiture of such deposit, on breach of the agreement, is not in the nature of a penalty if the sum deposited is reasonable in amount.

Manian Patter v. The Madras Railway Company (1) referred to.

RULE granted, on an application under section 25 of the Provincial Small Cause Courts Act (IX of 1887), to the Singer Manufacturing Company (through their constituted agent and manager, N. M. Patell) the plaintiffs.

The facts are as follows :—The plaintiffs agreed in writing to let out to the defendant No. 1, on the hire-purchase system, a sewing machine and accessories on the following terms and conditions, *inter alia*, that the defendant No. 1 should pay to the plaintiffs the sum of Rs. 20 at the time of the delivery of the machine, and further monthly payments of Rs. 5 to be paid in advance each month for a period till the sum of Rs. 145 shall have been so paid for the hire of the machine; that at the end of the said period credit would be given to the defendant No. 1 of the sum of Rs. 20 paid as aforesaid, and no further payment by the defendant would be necessary, and the machine would become his property. But no credit would be given for the said sum of Rs. 20 unless and until a purchase was effected in accordance with the provisions of the said

* Civil Rule No. 1201 of 1909, against the order of Charu Chandra Mookerjee, Offg. Subordinate Judge of Monghyr, dated Jan. 19, 1909.

(1) (1905) I. L. R. 29 Mad. 118.

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agreement. Clause (e) of the said agreement was as follows :—
 “When the hiring is terminated ^{and} _{or} the machine and accessories are returned to the owner, the hirer shall not on any ground whatever be entitled to any allowance, credit, return or set off for payment previously made.” The defendant No. 2 guaranteed the due performance and observance by the defendant No. 1 of the terms and conditions of the said agreement. The defendant No. 1 paid the rent for four months only, and, in breach of the said agreement, failed to pay the rent for eight months, and to return the machine and accessories to the plaintiffs. They, thereupon, brought a suit in the Small Cause Court at Monghyr for Rs. 145, which was both the price of the machine and the hire of the same for the eight months, or for the return of the machine. After the institution of the suit, the machine was, by consent, returned to the plaintiffs.

The Subordinate Judge, vested with the powers of the Small Cause Court, decreed the suit in part concluding as follows :—

“It is said on plaintiffs’ favour that the payment of Rs. 20 is forfeited to the Company according to the terms of the agreement. This, however, appears to have been entered as a penal clause and the parties did not, I think, understand that it would be strictly followed. I find, therefore, that the plaintiffs are entitled to Rs. 20 as hire. This suit is accordingly decreed in part with proportionate costs.”

Whereupon, the plaintiffs moved the High Court and obtained this Rule on the defendants to show cause why the order of the Small Cause Court Judge should not be modified.

Mr. Mehta (Babu Dwarka Nath Mitter with him), for the petitioners. The Subordinate Judge held that the deposit of Rs. 20 made at the time of the delivery of the machine was in the nature of a penalty, and tried to bring this case under section 74 of the Contract Act. I submit that it is not a penalty, and rely on *Manian Patter v. The Madras Railway Company* (1) and *Wallis v. Smith* (2). I also rely on clause (e) of the contract.

Babu Khetter Mohan Sen, for the opposite party. The agreement was, that after one year the defendant No. 1 was to

(1) (1905) I. L. R. 29 Mad. 118.

(2) (1882) L. R. 21 Ch. D. 243.

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return, and the plaintiffs to accept, the machine back. Under the contract, the machine could be purchased if the defendant wished to do so ; if not, it could be returned. It was entirely optional for the defendant to do so or not. The defendant has paid in all Rs. 40 and, by consent of the parties, the machine was taken back by the plaintiffs. It is not their case to treat this as a breach of contract. The clause with reference to the Rs. 20 is a penal clause and cannot be enforced under section 74 of the Contract Act.

SHARFUDDIN AND RICHARDSON JJ. This is a Rule on the opposite party to show cause why the order of the Small Cause Court Judge, dated the 19th January 1909, should not be modified.

The facts are that the plaintiffs, who are agents on behalf of the Singer Manufacturing Company, let out under a written agreement a sewing machine to the defendant. The agreement provided, *inter alia*, that the defendant should pay for the hire of the machine a sum of Rs. 5 every month in advance. At the time of the delivery of the machine, a sum of Rs. 20 was paid by the defendant to the plaintiffs, and the agreement stated in the preamble that no credit was to be given for this sum on account of rent unless and until a purchase was effected in accordance with other provisions. In clause (e) of the agreement there is the following further condition :—" When the hiring is terminated ^{and}_{or} the machine and accessories are returned to the owner, the hirer shall not, on any ground whatever, be entitled to any allowance, credit, return or set off for payment previously made." The defendant having failed to pay the monthly rent and being still in the possession of the machine, a suit was brought by the plaintiffs in the Small Cause Court. The claim was for Rs. 40 as rent and Rs. 105 as the price for the machine. It seems that, after the institution of the suit, the defendant expressed himself as ready to return the machine, and the plaintiffs were willing to take it back, and it was accordingly returned. The claim for the price of the machine was, therefore, not pressed.

A decree has been made by the Judge of the Small Cause Court awarding the plaintiffs Rs. 20 on account of rent of the machine, the balance of the claim for rent being rejected on the ground that Rs. 20 had already been deposited.

The plaintiffs have obtained the present Rule.

The question involved is whether the sum of Rs. 20, which was paid to the plaintiffs at the time of the delivery of the machine, should or should not be taken into account in determining the amount of rent due.

The lower Court has held that the provision for the forfeiture of that sum was in the nature of a penalty.

We do not think so. In the case of *Manian Patter v. The Madras Railway Company* (1), it was held "that neither section 74 of the Indian Contract Act, nor the principles of law laid down in decisions dealing with *promises to pay specified sums* in case of breach of contract, apply to cases of forfeiture of deposits for breach of stipulations even when some of them are but trifling, while others are not such. In such cases the rule is that where the instrument refers to a sum deposited as security for performance, the forfeiture will not be interfered with if reasonable in amount."

We do not consider that as regards amount, Rs. 20 was at all unreasonable under the circumstances, and we think that the sum of Rs. 20 is subject to forfeiture under the agreement.

Let the amount decreed to the plaintiffs be increased by Rs. 20.

The Rule is made absolute with costs.

Rule absolute.

(1) (1905) I. L. R. 29 Mad. 118.

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MATRIMONIAL JURISDICTION.

Before Mr. Justice Fletcher.

BRIGHT v. BRIGHT.*

1909
July 12.

*Divorce—Jurisdiction—“Permanent Residence”—Divorce Act (IV of 1869)
s. 3 (1)—“Last resided together.”*

In a petition for dissolution of marriage, where the husband and wife had no permanent residence :—

Held, that the petition could be entertained by the Court having jurisdiction over the place where they ‘last resided together’ though for a short period.

PETITION for divorce by the husband.

The facts of the case are as follows : The petitioner, George Edmond Bright, was a Railway Engineer by profession and had no permanent residence. He married the respondent, Elizabeth, at Karachi in 1896, and then they lived together at various places in the Bombay Presidency till they came, in December 1901, to Calcutta where they lived at the “Grand” hotel for about a fortnight. While living there, they mutually agreed on certain terms to separate and live apart from each other. It was alleged by the petitioner that later on he discovered that the respondent and the co-respondent, E. J. Simpson, had lived together at certain places in the Bombay and Madras Presidencies, and were still living together at Bombay. He, however, presented his petition for divorce in the Calcutta High Court. The respondent and the co-respondent did not enter appearance.

Mr. Langford James, for the petitioner. The only question that may arise in this case is whether this Court has jurisdiction to entertain this petition. No doubt the parties live outside the jurisdiction of this Court, but by section 3 (1) of the Indian Divorce Act (IV of 1869) the petitioner has an option of two Courts, namely, either the Court within the jurisdiction of which the parties “reside” at the time of filing the petition, or

* Original Civil Suit (Matrimonial) No. 6 of 1909.

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the Court in whose jurisdiction they "last resided together." The petitioner may choose in which of these two Courts he may bring his suit: *Ratnagiri Pillai v. Syed Ravuthan* (1). The words of section 3 (1) of the Act are "within whose jurisdiction the husband and wife reside or last resided together." It is not necessary to contend that there was any fixed residence such as might have to be proved in cases under other Acts where residence must be shown. The words are tantamount to "last cohabited together": *Rattigan on Divorce*, page 22. If it is necessary to show some residence, then there are cases which show that in the absence of any fixed home a man must be taken to reside at the place where he is in fact living at any time: *Morris v. Baumgarten* (2), *Fernandez v. Wray* (3), *In re DeMomet* (4), *Alexander v. Jones* (5), *Lawrence v. Ingmire* (6). *Jogendra Nath Banerjee v. Elizabeth Banerjee* (7).

Cur. adv. vult.

FLETCHER J. This is a petition presented to the Court by the petitioner for the purpose of obtaining the dissolution of his marriage with the respondent on the ground of her adultery with the co-respondent.

At the hearing, I was satisfied with the proof of the adultery and also with the reasons given for not bringing the suit earlier.

The only question on which I reserved judgment was as to the jurisdiction to make a decree.

Now, the only peirod during which the petitioner and the respondent resided together in Calcutta was for a period of 16 or 17 days in the month of December 1901 when they finally separated. Prior to that, the petitioner and the respondent had cohabited together at Raigarh, and if the petition had been presented when the parties were living together at Raigarh, it would have had to be presented to the High Court at Bombay.

(1) (1896) I. L. R. 19 Mad. 477.

(4) (1894) I. L. R. 21 Cal. 634.

(2) (1865) Coryton 152.

(5) (1866) L. R. 1 Ex. 133.

(3) (1900) I. L. R. 25 Bom. 176.

(6) (1869) 20 L. T. 391.

(7) (1898) 3 C. W. N. 250.

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—
FLETCHER J.

At the time of the presentation of the present petition, the petitioner, the respondent and co-respondent were all resident in Bombay.

The petitioner, however, says that the Indian Divorce Act gives him an option of either bringing his suit in the High Court at Bombay as the place where the husband and wife "reside," or in this Court as being the High Court of the place where the parties "last resided together."

I have, therefore, to consider whether the husband and wife "last resided together" during the short visit to the Grand Hotel, Calcutta, in December 1901.

I have come to the conclusion, not without some hesitation, that in this particular case the parties did last reside together in Calcutta. This, I think, is one of those cases where the husband and wife never had a permanent residence. The petitioner was engaged as an Engineer on the Railway and his habitation seems to have changed very frequently. It is difficult to say which of the many places at which he dwelt before he separated from his wife in 1901, was his 'residence' or 'last residence' except on the basis that this is one of the cases where the actual abode for the time being is the only residence.

I accordingly hold that the husband and wife 'last resided together' in Calcutta and pronounce a decree *nisi* for dissolution of the marriage between the petitioner and the respondent.

As there is no evidence that the co-respondent was aware that the respondent was a married woman before the filing of the petition, I cannot make any order for costs against him.

Attorneys for the petitioner : *Leslie & Hinds.*

S. C. B.

PRIVY COUNCIL.

SECRETARY OF STATE FOR INDIA

v.

INDIA GENERAL STEAM NAVIGATION AND RAILWAY
COMPANY. LD.

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P.C.*

July 1, 20

[On appeal from the High Court at Fort William in Bengal.]

Compensation—Land Acquisition Act (1 of 1894)—Amount of Compensation payable for land on left bank of river Hooghly near Calcutta required for purposes of the Port Commissioners of Calcutta—Judgment in former land acquisition case regarding land in the vicinity, and amount awarded therefor—Review by High Court of valuation by Special Judge.

In this case which related to the amount of compensation payable to the owners of certain land on the left bank of the river Hooghly near Calcutta, which had been acquired by the Government of Bengal under Act I of 1894 for the purposes of the Port Commissioners of Calcutta, the High Court did not agree with the scheme of valuation made by the Special Judge, and had increased his award relying upon the prices paid for a piece of land in the vicinity in previous land-acquisition proceedings as affording a guide to the amount of compensation to be awarded in the present case. And on appeal by the Government, it was contended that in doing so the High Court had wrongly disregarded the great experience of the Special Judge and had given undue weight as evidence to the decision in the former case, in which it was said that the land was so essentially different in area, locality, and special and peculiar advantages, that no deduction could be drawn from the amount awarded for it which would be of any use in estimating the value of the land now in dispute. Their Lordships of the Judicial Committee holding that no good ground for such a contention had been established, dismissed the appeal.

APPEAL from a decree (11th April 1906) of the High Court at Calcutta which varied a decree (11th January 1905) of the Special Land Acquisition Judge of the 24-Pergunnahs, made in Land Acquisition Case No. 200 of 1903.

The party opposing the award of compensation for the acquisition of the land was the appellant to His Majesty in Council.

* *Present*: LORD MACNAGHTEN LORD DUNEDIN, LORD COLLINS, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

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The matters in dispute between the parties arose out of the acquisition by the Government of Bengal, under the powers conferred by Act I of 1894, of the premises Nos. 6, 7 and 8, Garden Reach, in the suburbs of Calcutta, for purposes connected with improvements at the Kidderpore Docks proposed to be made by the Port Commissioners of Calcutta.

The facts and findings of the Special Judge are sufficiently stated in the judgment of the High Court (MR. JUSTICE RAMPANI and MR. JUSTICE ASHUTOSH MOOKERJEE) now appealed from, which was as follows :—

“This is an appeal against a decision of the Special Land Acquisition Judge of the 24-Pergunnahs in a reference made to him under section 18 of Act I of 1894. The land in dispute is 53 bighas in area, situated on the Garden Reach Road and bearing the numbers 6, 7 and 8. It has been acquired at the instance of the Port Commissioners for improvements at the Kidderpore Docks, and for the accommodation of their workshops at Garden Reach. The claimants are one Mrs. Malcolm and the India General Steam Navigation and Railway Company. The first claimant raised only a question of apportionment. The second claimant objected to the valuation of the Collector who had estimated the value of the land at Rs. 500 per cottah, had allowed Rs. 1,31,050-2 for the structures on the land, and Rs. 500 for removal of moveables. After deducting the capitalized value of the Government revenue and adding 15 per cent. for the statutory allowance, the net amount awarded by the Collector was Rs. 7,57,024-12-9.

“The Special Judge appraised the land as follows :—

“He regarded it as apportioned into blocks, and roads constructed through it, which in his opinion would occupy nine bighas of the area. He then divided it into belts of river frontage, firm and low land, valuing the first class at Rs. 1,20,960, the second, as if it paid a rental of Rs. 9 per cottah per month (=Rs. 5,18,400), and the third class, as if it paid a rental of Rs. 3 per cottah per month (=Rs. 34,560). He further allowed a sum of Rs. 25,000 for the value of the position of lands so that he altogether allowed the claimant Rs. 6,83,920 for the land.

“He still further allowed Rs. 20,000 for the materials of the buildings on the land, for they would, in his opinion, have to be removed, if the land were divided into blocks, and roads constructed through it. He gave the same amount as the Collector for the removal of movables, viz., Rs. 500. Rs. 3,961 for a pontoon, and certain jetties and shear-legs. After deducting the capitalized value of the Government revenue at 20 years' purchase and adding the statutory allowance, he awarded to the claimants Rs. 54,594-11-11 in excess of the Collector's award or Rs. 8,11,619-8-8 in all.

“The India General Steam Navigation and Railway Company now appeals.

“Mr. Garth on their behalf objects to the system of valuation adopted by the Special Judge and claims Rs. 6,79,349-2-3 in excess of the sum awarded

by the Judge. According to the particulars of the Company's claim, a sum, of Rs. 10,70,000 is claimed for the land at the rate of Rs. 1,000 per cottah, Rs. 90,786-10-0 for the buildings on the premises No. 6, Rs. 22,937-12-0 for the buildings on premises No. 7, and Rs. 52,186-7-9 for the buildings on the premises No. 8, Garden Reach Road, Rs. 90,000 for the jetties, pontoons and shear-legs, total Rs. 13,25,910 and the statutory allowance at 15 per cent. on this sum.

"Mr. Garth's objection to the Special Judge's system of valuation are:— (i) that he has over-estimated the area of land necessary to be set apart for roads; and (ii) that he has under-estimated the value of the land, and overlooked the fact that by the opening up of the land by means of roads, the land would practically all become frontage land.

"He relies in support of his claim for the valuation of the land at Rs. 11,000 per cottah on—(1) the fact that the Port Commissioners, when they sold certain land, at the Watganj Pumping Station, which is not very far from the disputed land, to the Calcutta Municipal Corporation, charged them at the rate of Rs. 3,300 per cottah, (2) on an opinion expressed by Mr. Apjohn, the former Engineer and Vice-Chairman of the Port Commissioners, that one-third of the premises Nos. 6, 7 and 8, Garden Reach, was worth 5 lakhs, (3) on two judgments of this Court as to the value of land in the neighbourhood, (4) on certain awards of the Collector for similarly situated lands, (5) on certain conveyances and a lease of lands not far from the lands acquired, (6) on evidence of rents paid for land in the neighbourhood, and (7) on the evidence of certain expert witnesses. On the other hand, the Port Commissioners contend that the land they have now acquired is to the south of the Kidderpore Docks, and therefore of admittedly less value than land to the north of the docks, to which all the awards, conveyances and leases (except one) produced by the claimants relate, and (2) on certain conveyances and leases of land to the south of the docks, *i.e.*, on the same side of the docks as the premises Nos. 6, 7 and 8, Garden Reach Road, and (3) on the evidence of their present Engineer Mr. F. Palmer.

"We must admit that there is much force in Mr. Garth's criticisms of the the Special Judge's system of valuing the land. It is impossible for us to say how much land would require to be left for roads. There is no evidence in this point. Mr. Beachcroft's conjecture that it would be proper to leave nine bighas out of account as required for this purpose may be right or may be wrong, but without the evidence of an Engineer on the subject we can form no definite conclusion on this point. Similarly, there are practically no data on which we can check his division of the land into belts of frontage, firm and low land, or his valuation of the frontage land or of the firm land at Rs. 9 per cottah, the low land at Rs. 3 per cottah, and the dock basin and tank land at half rates. We can only say that comparing the rates allowed by him with the rates mentioned in the conveyance and leases produced by the claimants they appear to be inadequate and below the rates to which, in our opinion, the claimant company is justly entitled.

"We do not attach much importance to the sale of the land for the Watganj Pumping Station by the Port Commissioners to the Calcutta Municipal

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Corporation at the rate of Rs. 3,300 per cottah. The Municipality urgently required a small area of land in that particular locality for a Pumping Station; no other land than the land the Port Commissioners had to sell would meet their requirements; so the Port Commissioners clearly took advantage of the Municipality's exigencies and made them pay a 'fancy' price.

"Nor do we consider that we can regard Mr. Apjohn as having definitely valued a third of the premises 6, 7 and 8, Garden Reach Road, at 5 lakhs of rupees. It appears that Mr. Apjohn and Mr. Ashton of the firm of Messrs. Kilburn and Company had some informal conversation on the subject of this land. Both gentlemen seem to have been endeavouring to ascertain the views of the other. Mr. Apjohn led Mr. Ashton to think, he would recommend to the Port Commissioners to buy one-third of the premises at this figure; but it does not appear certain that Mr. Apjohn, when officially approached on the subject, would have made any such recommendation, or that the Port Commissioners would have accepted such recommendation, if made to them.

"The judgments of the High Court relied on by the claimant are two in number, one dated the 13th August 1903 when the Chief Justice and Mr. Justice Geidt awarded Rs. 950 a cottah for certain frontage, and Rs. 550 a cottah for certain back land situated at the junction of the Watganj and Garden Reach Roads, i.e., for land in a very favourable situation and on the Calcutta side of the docks. The other judgment is one by Harington and Brett JJ., dated the 18th June 1903, awarding Rs. 375 per cottah for land on the south side of the docks. This land faced the Mithapukur Road, which connects the Garden Reach with the Circular Garden Reach Road. The awards were for the premises 11, 12 and 13, Garden Reach Road, which are situated very near the land which is the subject of contention in this case, and with considerable, if not exactly similar, advantages in the way of river frontage. A rate of Rs. 240 per cottah was awarded for No. 12, Garden Reach, and Rs. 495 per cottah for the adjoining premises. There appears to be no satisfactory explanation forthcoming of the difference in these rates.

"The rates specified in the conveyances relied on by the claimant also vary in an extraordinary manner—running from Rs. 1,000 to Rs. 8,000 per cottah. But as the Judge points out, these conveyances are for small pieces of land situated in the populous quarter of Watganj on the Calcutta side of the docks. The lease is at the rate of Rs. 4-8-0 per cottah, but a bonus of Rs. 1,000 was paid which raises the rental to about Rs. 8 per cottah.

"Then, evidence has been given of rents paid in the neighbourhood. The indenture in favour of Messrs. John King and Company, dated the 31st March 1904, shows that certain land on the Calcutta side of the docks was let to this firm at a rental of about Rs. 6 per cottah. The evidence of the witness, Hari Mohan Ghose, shows that he pays rent for land on the south side of the docks at the rate of Rs. 4 per cottah.

"The valuations made by the expert witnesses cited by the claimant also differ very greatly. Mr. Warwick values the road and the river-frontage land at Rs. 1,000 per cottah and the interior land at Rs. 800 per cottah. Mr. Owen values the high land at Rs. 1,000 per cottah and the interior land at Rs. 800 per cottah. Mr. Owen values the high land at Rs. 900 per cottah and the

sloping and tank land at Rs. 450. Mr. Stevens divides the whole land into two portions and gives Rs. 1,000 per cottah for the river side portion, and Rs. 800 per cottah for the road side portion with lower rates for tank and low lands. Mr. Aitken values the high land at Rs. 800 per cottah. Now, these gentlemen are all expert witnesses. We are familiar with their names. They appear in almost every land acquisition case, either for the one side or the other. They have of course special knowledge of the value of land in Calcutta and its neighbourhood, but we can only say that we consider they have in their valuations estimated the lands at somewhat above the maximum rates fairly payable for it. It is unnecessary for us to allude to the scheme framed by Mr. Warwick for the laying out of the land to the best advantage. The Land Acquisition Judge, Mr. Beachcroft, has sufficiently criticised this scheme and pointed out the defects that are inherent to it.

"On the other hand, the Port Commissioners have given evidence of much lower rates of rent being paid to them by their tenants. The rents paid to them vary from 3 annas per cottah upwards for lands both to the north and south of the disputed land."

"They also produce a large number of conveyances of lands more or less to the south of the premises 6, 7 and 8, Garden Reach Road, the prices paid for which vary from Rs. 148 per cottah to Rs. 296 per cottah. This higher rate was paid for 46, Garden Reach Road, which is the farthest away from Calcutta.

"We may mention that we are informed that the alleged sale of the Shibpur College, which the Judge discusses in his judgment, has not taken place.

"Mr. F. Palmer, the present Engineer to the Port Commissioners, deposes that in his opinion the proper value of the acquired premises is Rs. 400 per cottah which would seem to us to be much too low a rate for the land.

"It is clear, however, we consider from the evidence adduced on behalf of the Port Commissioners, that land on the Calcutta side of the docks is much more valuable than on the further side. This may be partly due to the obstruction caused to passers-by owing to the constant and prolonged closure of the Swing Bridge at the docks; but also to a great extent to the fact that the land on the further side of the docks is more sparsely populated than the land on the Calcutta side and is in every way less favourably situated for business purposes.

"In these circumstances we must admit we find it most difficult to appraise accurately the value of the premises Nos. 6, 7 and 8, Garden Reach Road. But basing our valuation on the evidence given in this case on both sides and taking into consideration such evidence, as to rates of rent, sales and awards, we are inclined to value the land at very much the rates given by the learned Chief Justice and Mr. Justice Geidt for the land taken up at the corner of the Watganj and Garden Reach Roads. This land is very near, if it is not the nearest land, to the subject of this reference, of the value of which we have evidence. This land is no doubt to the north of the docks and nearer Calcutta than the lands now the subject of enquiry: but on the other hand Nos. 6, 7 and 8, Garden Reach, have greater advantages in the way of river frontage. The learned Chief Justice and Mr. Justice Geidt gave Rs. 950 per cottah to the front and Rs. 550 per cottah for the back land, *i.e.*, Rs. 750 per cottah on an

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average. We consider we should give this average rate for the firm land of the premises Nos. 6, 7 and 8, Garden Reach, irrespectively of its situation, *i.e.*, whether front or back, but we think we should give only half this rate for the dock, basin, and tank land. Two of the expert witnesses on the side of the claimant, Mr. Stevens and Mr. Owen, give lower rates for the dock basin, and tank land and the Special Judge proceeds on the same principle.

"As for the buildings, we think, we should allow the claimant the sum of Rs. 1,31,050-2-0 which was the Collector's estimate of their value. The claimant is also entitled to Rs. 500 as allowed by the Collector for the removal of movables, Rs. 3,961-0-0 for the value of the jetties, pontoon and shear-legs, to the valuation of which no exception has been taken during the hearing of this appeal. From the amount must be deducted the capitalized value of the Government revenue at 20 years' purchase. The claimant is, of course, entitled to the statutory allowance of 15 per cent. on the amount of compensation awarded and to costs in proportion in both Courts. We decree the appeal to this extent accordingly. The cross-objections were not pressed."

On this appeal,

Cohen, K.C., DeGruyther, K.C., and A. M. Dunne, for the appellant, contended that the High Court proceeded on an erroneous principle in adopting as the basis of valuation of the land the value put in previous land acquisition proceedings between different parties, in connection with an entirely different plot of land, and irrespective of and without regard to essential elements of dissimilarity in regard to area, locality, and special and peculiar advantages. The judgment in the previous case relied upon by the High Court was not evidence in the present case of the value of the land in dispute. The land to which that judgment related had, by reason of its position in a highly congested business area at the junction of two main traffic thoroughfares, a special and extraordinary value, and it had nothing in common with the land now in question which could form the basis of comparison between the two in estimating their respective values. In so acting erroneously the High Court had disregarded evidence relating to other land which in respect of proximity and advantages was more similar to the land now in dispute than that covered by the decision relied upon by the High Court. The value of the land in question ought to have been based on the evidence adduced in relation to the value of land on the west and south sides of the docks which as regarded area,

proximity, and general advantages was shown to possess very similar conditions to that now in question. The High Court when valuing the land on the abovementioned basis erred also in awarding to the respondents in addition the value of the existing buildings otherwise than as old materials the value of which had been agreed upon as Rs. 20,000. Finally, the High Court was in error in setting aside the scheme of the Special Judge in ascertaining the value of the land on a rental basis, and had ignored the fact of his special knowledge in connection with such valuation. The date of the declaration of requirement of the land (20th January 1903) was the date to be considered in valuing the land. Reference was made to the Land Acquisition Act (I of 1894), sections 11, 15, 18, 19 and 24: *Secretary of State for Foreign Affairs v. Charlesworth Pilling & Co.* (1) and *Premchand Burrall v. Collector of Calcutta* (2), a case under the former Land Acquisition Act (X of 1870).

Sir Robert Finlay, K.C., Sir Alfred Cripps, K.C., and Kenworthy Brown, for the respondents, contended for the reasons given in the judgment of the High Court that the amount of compensation allowed was not excessive, and that the valuation arrived at by the High Court should be upheld. Reference was made to *Ezra v. Secretary of State for India* (3) and Land Acquisition Act (I of 1894), section 40.

Cohen, K.C., replied.

The judgment of their Lordships was delivered by

LORD COLLINS. This is an appeal against a decree of the High Court of Judicature at Fort William in Bengal, dated the 11th April, 1906, and made in appeal No. 58 of 1905, which varied the decree of the Special Land Acquisition Judge of the 24-Pergunnahs, dated the 11th January, 1905, and made in Land Acquisition Case No. 200 of 1903.

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(1) (1901) I. L. R. 26 Bom. 1, 16, 17, 24; (2) (1876) I. L. R. 2 Calc. 103.

L. R. 28 I. A. 121, 130, 141.

(3) (1905) I. L. R. 32 Calc. 605;

L. R. 32 I. A. 93.

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The question relates to the amount of compensation payable to the owners of certain land on the left bank of the Hooghly, near Calcutta, which has been acquired by the Government of Bengal under Act I of 1894 for the purposes of the Port Commissioners of Calcutta.

The respondents to this appeal were owners of some portions, and lessees of other portions, of the land in question.

On the 12th June, 1903, an award was made by the Land Acquisition Collector under section 11 of the said Act of 1894, in which he assessed the compensation payable to the parties interested in the said premises at a sum of Rs. 7,57,024-12-9.

The claimants (respondents) filed a petition of objection to the said award and required the matter to be referred by the Collector for the determination of the Civil Court. The matter accordingly came in due course before the Special Judge of the 24-Pergunnahs appointed to hear and determine cases arising out of proceedings under the said Act, who allowed a sum of Rs. 54,594-11-11 in addition to the sum awarded by the Collector.

Against this decision the claimants appealed to the High Court. That Court, in a very careful judgment reviewing the earlier awards and comparing the prices realized on sales of land in the neighbourhood, having regard to the special advantages of, or drawbacks to, their respective situations, and having heard the evidence of experts on both sides, came to the conclusion that the total compensation due to the claimants ought to be increased to the sum of Rs. 10,13,591-8.

It seems to their Lordships that there is no question of principle involved in this appeal. In fact, the main argument of the appellant is a practical denial of the right of the High Court to review the findings of the Special Judge, whose great experience in such cases, they suggested, ought to outweigh all other considerations. Indeed, when one comes to close quarters with their objection to the decision, it seems to resolve itself into no more than this, that the Court gave undue weight to the prices paid on the sale of a particular piece of land in the vicinity as affording a guide to the compensation to be

awarded in the case before them. It is by no means clear to their Lordships that there is any good ground for this suggestion.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed.

The appellant will pay the costs of the appeal.

Appeal dismissed.

Solicitor for the appellant : *The Solicitor, India Office.*

Solicitors for the respondents : *Morgan Price & Co.*

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APPELLATE CIVIL.

Before Mr. Justice Stephen and Mr. Justice Vinces.

NIRAD MOHINI DASSI

v.

SHIBADAS PAL DEWASIN.*

1909
July 8.

Hindu Law—Shebaitship—Alienation of Shebaitship, inter vivos.

An alienation (*inter vivos*) of the office of *shebait*, by an *arpannamah*, to a closely connected member of the family who seems to have more interest in the worship of the idol than any one else, and without any idea of personal gain, is valid under the Hindu law.

Mancharam v. Pranshankar (1) followed.

Rajeshwar Mullick v. Gopeshwar Mullick (2) distinguished.

Khetter Chunder Ghose v. Hari Das Bundopadhya (3) and *Rajaram v. Gonesh* (4) referred to.

SECOND APPEAL by Srimati Nirad Mohini Dassi, the defendant No. 2.

The plaintiff, Shibadas Pal Dewasin, sued to establish his title and to recover possession of the land held in *khas* by partition, and of a certain share of the *pala* of the Billeswar *Thakur's sheba*.

* Appeal from Appellate Decree, No. 1520 of 1907, against the decree of Aghore Chandra Hazra, Subordinate Judge of Burdwan, dated April 15, 1907, confirming the decree of Saroda Prasad Banerjee, Munsif of Katwa, dated July 30, 1906.

(1) (1882) I. L. R. 6 Bom. 298.

(3) (1890) I. L. R. 17 Calc. 557.

(2) (1907) I. L. R. 35 Calc. 226.

(4) (1898) I. L. R. 23 Bom. 131.

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The facts are as follows :—The plaintiff was the owner of a certain share of the property in dispute and, as reversioner, was entitled to the shares in future upon the death of his co-sharers. The defendants, except the defendant No. 2, were joint *shebait*s with the plaintiff in succession to their predecessors in interest. Under a deed of *arpannamah* executed by the defendants Nos. 5, 6 and 7, who were residing at a distant place from the place of worship, in favour of their maternal uncle (the plaintiff), the plaintiff became further entitled to these defendants' shares in the *pala* of the said *Thakur's sheba*. Upon the defendants Nos. 1 and 2 resisting the plaintiff from getting possession of the said shares of the defendants Nos. 5, 6 and 7, the plaintiff brought this suit.

The defendant No. 2 contended, *inter alia*, that *debuttar* property and *sheba* were not partible by the Court, and that the *arpannamah* was collusive, fraudulent and illegal.

The Court of first instance decreed the suit in part declaring the plaintiff's title to the *sheba* of the *Thakur*; and on appeal, the learned Subordinate Judge affirmed the judgment of the first Court, holding that the office of *shebait* was alienable. The defendant No. 2 appealed to the High Court.

Babu Khetter Mohun Sen, for the appellant.

Babu Naliniranjan Chatterjee, for the respondents.

Cur. adv. vult.

STEPHEN AND VINCENT JJ. The plaintiff, respondent in this appeal, sued for certain shares in the *pala* of a *Thakur's sheba*, and in the property appertaining thereto. His claim is based on an *arpannamah* executed in his favour by three of the defendants Nos. 5, 6 and 7. He is at present an eight-anna owner of the property in dispute, has a reversionary interest in $\frac{5}{8}$ th of the remainder, and is the maternal uncle of defendants Nos. 5 to 7. It is asserted in the plaint, and appears to be the case, that the plaintiff owing to his place of residence and other advantages could perform the *sheba* of the *Thakur* much better than defendants 5 to 7, and that this was a reason for the *arpannamah*. Under these circumstances

relying on the decision in *Mancharam v. Pranshankar* (1), the lower Appellate Court has held that the office of *shebait* was alienable by defendants 5 to 7 and that the plaintiff acquired a good title under the *arpannamah*. This decision was, in our opinion, correct. It is true, that the decision in *Mancharam v. Pranshankar* (1) has recently been disapproved of in this Court [see *Rajeshwar Mullick v. Gopeshwar Mullick* (2)], but that was on the ground that the alienation was by will. At the same time Maclean C.J. admits that there are authorities for such an alienation *inter vivos* under special circumstances. Such special circumstances seem to have existed in the case of *Khetter Chunder Ghose v. Hari Das Bundopadhyaya* (3) where a transfer *inter vivos* of an idol and the lands with which it was endowed was allowed on the ground that the arrangement was a beneficial one for the idol, because it tended to provide for the proper conduct of its worship. Further light is thrown on the case by the judgment in *Rajaram v. Gonesh* (4), where Ranade J., while affirming the general rule against alienation, indicates private voluntary alienations as possible exceptions to the rule. It is to be observed that in *Mancharam v. Pranshankar* (1), the fact that the alienation was to a person in the line of succession and capable of performing the worship of the idol was regarded as a justification for the alienation, and that in *Rajeshwar Mullick v. Gopeshwar Mullick* (2), Mitra J. treated "clear benefit to the *Thakur*" in the same way. In the present case, therefore, as the alienation was by an *arpannamah* to a closely connected member of the family who seems to have more interest in the worship of the idol than any one else, and as it seems to have been made without any idea of personal gain, in order to prevent the interference of the appellant who claims herself as an alienee of the interest of defendants 5 to 7, we consider that the case is governed by the special circumstances to which Maclean C.J. refers.

The result is that this appeal is dismissed with costs.

Appeal dismissed.

(1) (1882) I. L. R. 6 Bom. 298.

(3) (1890) I. L. R. 17 Cal. 557.

(2) (1907) I. L. R. 35 Cal. 226.

(4) (1898) I. L. R. 23 Bom. 131.

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v.

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[On appeal from the Chief Court of Lower Burma at Rangoon.]

Burmese Law—Adoption—Evidence of adoption—Adult niece claiming to be adopted daughter of childless uncle, and entitled to his estate—Proof of publicity of relationship and notoriety essential—Inferences from past statements and conduct.

According to the law of Burma, by which no formal ceremony is necessary to constitute adoption, the fact of adoption can either be proved as having taken place on a distinct and specified occasion, or may be inferred from a course of conduct which is inconsistent with any other supposition. But in either case publicity must be given to the relationship, and the amount of proof of publicity required will be greater in cases of the latter category when no distinct occasion can be appealed to.

In the case of a child leaving its natural parents and being brought up in the house of another person who treats it as a father would a child, the inference of the relationship existing, and the publicity of the relationship may naturally be drawn from the facts of the lives of the parties, apart from their verbal statements. But in the case of an adult adoption where the inferences to be drawn from "bringing up" are necessarily absent, it is especially requisite to insist on adequate proof.

In this case an orphan adult niece claimed the estate of a childless uncle, with whom it was only natural she should live, on the ground that she had been taken by him as his adopted daughter when she was over 30 years of age, the evidence of the publicity of the relationship alleged depending upon the testimony of the claimant herself, and the statements of the deceased uncle spoken to by witnesses, and the consequence of upholding the adoption being the disinheritance of those entitled to succeed:—

Held, that the evidence was not sufficient to establish the adoption.

Where parties might have precluded the raising of subsequent questions by means of an actual, though not ceremonial, adoption in the presence of witnesses, and they had not done so, but had left the fact of adoption to be inferred from past statements and conduct, adequate proof of publicity and notoriety of the relationship should be insisted on.

* *Present*: LORD MACNAGHTEN, LORD DUNEDIN, LORD COLLINS, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

APPEAL from a judgment and decree (12th March 1907) of the Chief Court of Lower Burma in its appellate jurisdiction, which reversed a judgment and decree (1st May 1906) of the same Court in its original jurisdiction.

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The defendant was the appellant to His Majesty in Council.

U Mya, a Burman Buddhist, died at Rangoon on the 19th April 1905, leaving the appellant who claimed to be his adopted daughter, and two sisters, the respondents. The appellant was the daughter of U. Nyein who died in 1896, and Ma Ka who died in November 1900. Ma Ka was U Mya's sister, and the appellant's case was that, during Ma Ka's last illness, she asked her brother to take care of the appellant, and that he promised that he would look after her as his daughter; that after Ma Ka's death he did in fact treat her in every way as his daughter; that he gave up his own house in Rangoon and lived with her, up to the time of his death, in her house; and that he informed a number of people that she was his daughter or adopted daughter.

On 25th May 1905, the respondents applied to the Chief Court for Letters of Administration to the estate of U Mya as being his sisters and sole heirs. On 9th June 1905, a caveat was filed on behalf of the appellant, and on 19th June 1905, the Court ordered the matter to be tried as a suit that being the ordinary procedure in such cases.

On 4th July 1905, the appellant applied that Letters of Administration might be granted to her, and on 10th July 1905 the Court ordered the two cases to be tried together. The only issue was—"Is defendant (appellant) the adopted daughter of the deceased?"

The Court (BIGGE J.) held that the adoption was proved and ordered Letters of Administration to be issued to the appellant.

The Appellate Court (IRWIN and HARTNOLL JJ.) reversed the decision of the first Court on the ground that though no particular ceremony was required for adoption among Burman Buddhists, yet some overt act or speech on the part of the person

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adopting was necessary, and that the fact of the adoption must be shown to the public and notorious, and that in this case there was no proof of any overt act or of notoriety. The Appellate Court accordingly ordered that Letters of Administration should be granted to the respondents.

The material portion of the judgment of the Appellate Court was as follows :—

“ It was pressed on us at the hearing of the appeal that the judgment of the learned Judge on the Original Side contains no finding or statement as to the time at which the adoption took place. It must be admitted that that is so. The learned Advocate for Ma Ywet met this argument by saying that the adoption took place when U Mya gave up his own house and moved to Ma Ywet's house a few days after Ma Ka's death. His position is that this moving of house was a definite act by which U Mya signified that he was fulfilling the promise which he had made to his dying sister to take Ma Ywet as his own daughter and never to part from her.

“ This position is certainly the highest which, on the evidence, Ma Ywet could possibly take up. It seems, however, to entirely nullify the observation made by the learned Judge near the beginning of his judgment that disputes between U Mya and his sisters are of importance as being the foundation of his determination that his sisters should not inherit from him ; for the disputes did not arise until some years after the date now fixed for the adoption.

“ The learned Judge has found that U Mya spent a very considerable portion of his time after Ma Ka's death at Kawa and Thongwa, and there is no doubt about the fact. Moreover, I think it is certain that when U Mya gave up his own house in Rangoon he removed his furniture not to Ma Ywet's house but to Ma Mi's house at Kawa. The giving up of his own house, therefore, has very little significance ; and if his permanent residence was in any one place more than another, it seems to have been at Kawa. But, assuming that his permanent residence was at Ma Ywet's house, I find it very difficult to say that that fact can be regarded as signifying that he had adopted Ma Ywet. ”

After referring to a case cited before them in which it was stated that the investigation of these claims was commonly undertaken many years after the date of the alleged adoption, the Appellate Court continued :—

“ It might be added that the adopted child was usually adopted at such a tender age that he or she could not give any positive evidence of the act of adoption from his own knowledge. In both these points the present case is totally different. Ma Ywet is alleged to have been adopted about five years before the suit and when she was about 30 years of age. The reason, therefore, for not insisting on definite proof of the act of adoption entirely disappears . . . ”

After distinguishing the case of *Ma Me Gale v. Ma Sayi* (1), which had been referred to in argument, the judgment proceeded :—

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“The admitted principle is that the relationship must be public and notorious, and it is only because in most cases the adoption took place many years before the suit and when the person adopted was a child, that definite evidence of the act of adoption is not required. When the alleged adoption was recent and the person adopted an adult, it lies on the person asserting the adoption, in my judgment, to prove it by definite and direct evidence, or to give very substantial reasons for not doing so.

“The finding of the learned Judge on the Original Side is based on the following points which he enumerates—

“1. Ma Ywet's original natural relationship to U. Mya.

“2. His promise to her mother when dying to take and treat her as his own daughter.

“3. His abandoning his own house and going to live with her in the house where Ma Ka had died, and his continuing to live there till he died.

“4. His undoubted affection for her.

“5. His undoubted desire that she should inherit.

“6. His allusions to her as his daughter, and Pongyi U Ne Mein, and Maung Thaw as his adopted daughter.

“Points 1 and 4 require no remark.

“U Mya's promises to Ma Ka do not, I think, amount to a promise to adopt Ma Ywet. It was precisely the occasion on which, if adoption were intended, it would have been expressly mentioned; and it was not mentioned.

Moreover, even a promise to adopt would avail nothing without proof that the promise was carried into effect.

“Point 3 I have already dealt with.

“U Mya's desire that Ma Ywet should inherit was manifested near the end of his life, and the only view I can take of it is that his desires to make a gift, or a will, or to execute a formal deed of adoption, if they have any significance at all, signify that he had not yet adopted her; for if she were adopted nothing more would be necessary to cause her to inherit. I do not lay stress on this, any prudent man might guess that an adoption not effected by deed would be liable to be contested; but I merely remark that this part of the evidence does not help Ma Ywet's case.

“There remains the evidence that U Mya referred to Ma Ywet as his daughter or adopted daughter. After giving the fullest consideration to the words of their Lordships of the Privy Council above referred to, I think we are at liberty to rely on our own knowledge that Burmans use the words ‘father,’ ‘mother,’ ‘son’ and ‘daughter,’ very loosely, and to say that Mr. Dhar was perfectly correct in saying,—‘It would be quite natural for an old man like that to refer to a niece who had lived with him for a long time as his daughter.’ This is the evidence of a witness for the respondent.

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"Mr. Justice Bigge observed,—' One of the difficulties of this case is the obviously simple way in which the word *adopted* can be interpolated into an otherwise correct statement.' I agree with that, and I would go farther and say that this infirmity attaches to the evidence of even truthful witnesses when relating conversations which took place at a time when there was nothing to lead them to attach any importance to the word *adopted*. The infirmity is still greater when the evidence has been recorded by a Judge who is not acquainted with Burmese, and when the Burmese terms used by the witnesses, and translated 'adopt' and 'adopted' have not been recorded.

"The learned Judge rejected, so far as the word *adopted* is concerned, all the evidence of U Mya's statement except that of U Ne Mein and Saya Thaw. Saya Thaw's statement seems to me extremely inconclusive. He begins—' He told me about disputes with his sisters and the adoption of his niece;' but he immediately follows that up by a detailed statement which refers to nothing but the conversation at Ma Ka's death-bed. In cross-examination again he says—' In consequence of this he said he had brought her up as his daughter.' That is quite a different thing from adoption for the purpose of inheritance. It was only when repeatedly pressed in cross-examination that he committed himself to the statement that U Mya said he had adopted her. I think this evidence is worthless.

"But after all, the point is whether the relationship of father and daughter was public and notorious, and there is no evidence that it was. The evidence, such as it is, relates to private conversations between U Mya and the witnesses, and the circumstances under which the statements were made are such that, in nearly every case, the witness seems to have been ignorant of the relationship until it was specially made known to him by a private conversation with U Mya. This seems to me rather to indicate that the relationship was not generally known, and if the evidence is true it merely proves that U Mya made statements which may or may not be true. The statements are admissible under section 32 (5) of the Evidence Act, but their value is not very great, and they tend to disprove, rather than to prove, that the relationship of father and daughter was notorious.

"To sum up :—Though no particular ceremony is necessary for adoption, yet adoption cannot take place without some overt act or speech on the part of the person adopting; and when the person adopted was an adult, and the act of adoption was recent, it lies heavily on the person asserting the adoption to prove the overt act by direct evidence. Even if good cause be shown for dispensing with such evidence, the relationship of father and son, or father and daughter, must at least be proved to have been public and notorious. In this case there is no evidence whatever of any overt act by which adoption was effected. There is also no proof of notoriety. The evidence consists only of statements of U Mya, and many of the witnesses say that U Mya said he had adopted Ma Ywet before her mother's death—statements which Ma Ywet is obliged to repudiate because she took out Letters of Administration to her mother's estate.

"The evidence is, in my opinion, altogether insufficient to establish the fate of the adoption. I would, therefore, set aside the decree, and dismiss Ma

Ywet's petition, and declare that Ma Mi and Ma Me are entitled to Letters of Administration to the estate of U Mya."

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On this appeal which was heard *ex parte*,

DeGruyther, K.C., and *E. U. Eddis*, for the appellant, contended that the fact of her adoption was sufficiently established. The evidence was discussed in relation to the points on which the original Court relied which are set out in the judgment of the Appellate Court; and it was submitted that on all those points the probability was that the decision of the Judge who heard the evidence was right; and that what the Appellate Court held to be essential to, but wanting in, the appellant's case, namely, some overt act on the part of the person adopting, and the notoriety of the fact of adoption were satisfactorily proved. Reference was made to *Ma Me Gale v. Ma Sayi* (1), *Ma Gun v. Ma Gun* (2), *Ma Bwin v. Ma Yin* (3), *Maung Aing v. Ma Kin* (4), *Ma Mein Gale v. Ma Kin* (5), *Ma Gyan v. Maung Kywin* (6), *Ma Thine v. Ba Pe* (7), *Ma Sayi v. Ma Me Gale* (8), *Ma Tai Shwe v. Kau Gyi* (9), and Chan Toon's Principles of Buddhist Law.

The judgment of their Lordships was delivered by

LORD DUNEDIN. The only question in this appeal is whether Ma Ywet, the appellant, has proved that she was the adopted daughter of the late U Mya, who died in 1905. If she was, then she inherits U Mya's estate. If not, that estate is inherited by the respondents, Ma Me and Ma Mi, the sisters of the deceased.

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Ma Ywet is the daughter of Ma Ka, who was another sister of U Mya.

Ma Ka died in 1900, and up to that time there was no question of adoption, as Ma Ywet took out Letters of Administration to her mother as her child.

- (1) (1904) I. L. R. 32 Calc. 219, 228; (5) (1893) 1 Chan Toon's L. C. 168,
L. R. 32 I. A. 72, 75. 170, 172.
(2) (1874) 1 Chan Toon's L. C. 147. (6) (1895) 1 Chan Toon's L. C. 393.
(3) (1878) 1 Chan Toon's L. C. 151. (7) (1897) 2 Chan Toon's L. C. 53.
(4) (1893) 1 Chan Toon's L. C. 157, (8) (1901) 2 Chan Toon's L. C. 181.
161. (9) (1899) 2 Upper Burma Rep. 142.

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The story of the appellant is that, on the death-bed of her mother, her uncle U Mya promised her mother to adopt her, and that after her death he did so. Admittedly there was no specific occasion on which this was done by any quasi-ceremony or in presence of any witnesses or other persons.

It is said, however, that he acknowledged to other persons the fact that he had adopted her, and that his life and conduct in relation to her were consistent with the fact. This is denied by the respondents.

The learned Judge on the Original Side, before whom the suit depended, found that the appellant had sufficiently proved the fact of adoption ; but this judgment was reversed on appeal, the learned Judges of the Appellate Court holding that the appellant had failed to make out her case.

It has already been laid down by this Board that, according to the law of Burma, no formal ceremony is necessary to constitute adoption. One may go further and say that, though adoption is a fact, that fact can either be proved as having taken place on a distinct and specified occasion, or may be inferred from a course of conduct which is inconsistent with any other supposition. But in either case publicity must be given to the relationship, and it is evident that the amount of proof of publicity required will be greater in cases of the latter category, when no distinct occasion can be appealed to.

The present case is one of these, and it is on the question of the want of publicity that the learned Judges of the Court of Appeal have differed from the Judge of original jurisdiction.

In many cases the inference of the relationship existing, and the publicity of the relationship itself, may naturally be taken from the facts of the life of the parties apart from the verbal statements of those concerned. Thus when a child who has natural parents leaves those parents and its own home, and is brought up in the house of another who treats it as a father would a child, the inference is not difficult to draw, and the facts from which that inference is drawn are public facts necessarily known to all the person's friends and acquaintances. Some of the decided cases are instances of this sort. In the

present case such considerations are unavailable, because before adoption is alleged to have taken place, Ma Ywet was 30 years old, was an orphan, and, as the niece of a childless uncle, was a natural person to live with him.

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Accordingly the evidence of the publicity of the relationship alleged really comes to depend upon the testimony of Ma Ywet herself and the statements of the deceased U Mya spoken to by some of the witnesses. The learned Judges of the Appellate Court have held that the testimony falls short of being satisfactory. Their Lordships are unable to say that, in their opinion, the learned Judges are wrong in this opinion. In the case of an adult, when the inferences to be drawn from "bringing up" are necessarily absent, and where the consequence of adoption is disinherison of those entitled to succeed by law, it is, in their Lordships' view, especially necessary to insist on adequate proof. It would have been easy for the parties, by means of an actual, though not ceremonial, adoption in presence of witnesses, to have precluded the raising of subsequent questions. Where that has not been done, and where the fact of adoption is left to be inferred from past statements and conduct, it is, in their Lordships' opinion, a salutary rule that adequate proof of publicity or notoriety of the relationship should be insisted on.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed.

As the respondents have not appeared in the appeal, there will be no order as to costs.

Appeal dismissed.

Solicitors for the appellant : *Sanderson, Atkin, Lee & Eddis.*

CRIMINAL REVISION.

Before Mr. Justice Coxe and Mr. Justice Ryves.

1909
July 20.

AKALOO CHANDRA DAS

v.

MOHESH LAL.*

Tolls—Dispute concerning the right to collect market tolls and not the possession of the market land—Possession under ekrarnama as agent of co-sharer for collection of tolls and division of profits—Jurisdiction of Magistrate—Criminal Procedure Code (Act V of 1898) s. 145.

Section 145 of the Criminal Procedure Code does not apply to a dispute relating to the rights of co-sharers to collect tolls in proportion to their respective shares in a *hât* and not to the possession of the *hât* itself.

Where one of two co-sharers was entitled under an *ekrarnama* to collect the tolls of the whole market and to divide the profits with the other co-sharer at the end of the year, and the lessee of the latter attempted to collect his lessor's share independently:—

Held, that the Magistrate had no jurisdiction to take proceedings under section 145 in such a case.

A Magistrate cannot under the section determine the method by which the possession of the parties is to be exercised or the agency by which the party in possession is to collect the profits of land.

Nritta Gopal Singh v. Chandi Charan Singh (1) followed.

Sri Mohan Thakur v. Narsing Mohan Thakur (2) distinguished.

Tarujan Bibee v. Asamuddi Bepari (3) referred to.

DHANESSUR LAL and Mathoor Mohan Das were the *seputnidars* of the Gohatta Bolarampur *hât* in the district of Purneah, and held therein ten-annas and six-annas shares respectively. In November 1900, Mathoor executed an *ekrarnama* empowering Dhanessur to collect also his six-annas share of the tolls in *ijmali* and to divide the proportionate profits annually between them. On the death of Mathoor his son, the petitioner Kristo Mohan Das, became his heir, and he leased his undivided share in the *hât* to the petitioner, Akaloo Chandra Das, in *ijara*

* Criminal Revision No. 548 of 1909, against the order of S. Karam Husain, Deputy Magistrate of Purneah, dated March 24, 1909:

(1) (1906) 10 C. W. N. 1088.

(2) (1899) I. L. R. 27 Calc. 259.

(3) (1900) 4 C. W. N. 426.

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on the 27th January 1909. The opposite party, Mohesh Lal, who had succeeded his father, Dhanessur, continued to collect the 16-annas tolls after the death of the latter. On the 31st January, Akaloo went to the *hât* with a body of men and tried to collect the six-annas tolls by force, whereupon Mohesh Lal complained to the police who, after inquiry, submitted a report the next day recommending proceedings under sections 107 and 144 of the Code against the petitioners. Thereupon the District Magistrate of Purneah issued notices under section 144, and drew up a proceeding under section 145 of the Code, on the 9th ultimo, against Mohesh Lal as first party and Akaloo as second party, to which the petitioner, Kristo Mohan, was subsequently added as a party with his lessee. Mohesh Lal filed a written statement on the 22nd instant admitting that Kristo Mohan was entitled to a six-annas share and was in possession thereof, but he claimed to have the right under the *ekrarnama* to collect the whole of the tolls. The share of Mohesh Lal was admitted by Kristo Mohan in his written statement, but his right to collect the entire toll was disputed, and the genuineness of the *ekrarnama* impugned. The District Magistrate by his order, dated the 24th March, declared Mohesh Lal to be in possession of the *hât*, whereupon the petitioners moved the High Court and obtained the present Rule.

Babu Dasharathy Sannyal (Babu Hemendra Nath Sen and Babu Ramani Mohan Chatterji with him), for the petitioners. The *ekrarnama* was personal to its parties and is not binding upon Kristo Mohan. The dispute is one as to the right to collect the tolls of the *hât* and not as to the possession of it, and section 145 does not apply. He relied mainly on *Nritta Gopal Singh v. Chandi Charan Singh* (1) and *Radha Raman Ghose v. Baliram Ram* (2).

Mr. Chatterjee (Babu Jotindra Nath Banerjee with him), for the opposite party. The deed is binding on the successors of the parties to it. Mohesh Lal has all along collected the

(1) (1906) 10 C. W. N. 1088.

(2) (1904) I. L. R. 32 Calc. 249.

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tolls of the *hât* and is in possession. Section 145 applies to this case : *Sri Mohan Thakur v. Narsing Mohan Thakur* (1).

Cur. adv. vult.

COXE AND RYVES JJ. This is a Rule on the District Magistrate of Purneah to show cause why an order under section 145 of the Criminal Procedure Code should not be set aside on the ground that the Magistrate had no jurisdiction to pass any order in respect of the subject-matter of the dispute in which the parties claimed to be jointly interested.

The Magistrate has submitted an explanation, but does not refer therein to the difficulty which has occasioned the Rule.

It appears that the first party, Mohesh Lal, and Kristo Mohan Das of the second party, are entitled to the market in dispute. The former is entitled to ten annas and the latter to six annas. Akaloo Chandra, the other member of the second party, is a lessee from Kristo Mohan Das. The Magistrate finds that Mohesh Lal of the first party obtained an agreement from the father of Kristo Mohan Das authorizing him to make collections of the whole of the tolls, and to divide the shares at the close of each year. Under this agreement he collected the whole of the tolls. Akaloo attempted to collect a six-annas share but was prevented, and has never been able to enforce his rights. The written statement of the first party fully admits that Kristo Mohan Das not only is entitled to a six-annas share of the collections from the market, but is actually in possession thereof. Indeed, if Mohesh Lal is collecting his share on his behalf, and giving it to him, it is difficult to see how Kristo Mohan Das' possession can be denied. There is nothing to show that this agreement is irrevocable, and Mohesh Lal's collection of tolls under it must, we think, be regarded, so far as the six-annas share is concerned, as a collection by him of Kristo Mohan Das' tolls in the capacity of Kristo Mohan Das' agent. This being so, we do not think that the order of the Magistrate can be regarded as within jurisdiction. He

is entitled to decide which of the parties is in possession. Here the possession is undisputed, and the only dispute that exists relates to the machinery by which Kristo Mohan Das exercised his possession. The view that we take appears to us to be supported by the decision in the case of *Nritta Gopal Singh v. Chandi Charan Singh* (1), the circumstances of which case are very similar to those of the case now before us. Doubtless, if Mohesh Lal was in possession in the capacity of a lessee or under some agreement that Kristo Mohan Das could not terminate, the position might be different, and in such a case an order under section 145 of the Criminal Procedure Code might perhaps be permissible.

The learned counsel for the opposite party relies on the case of *Sri Mohan Thakur v. Narsing Mohan Thakur* (2). That case, however, was distinguished in the case which we have already cited, and the effect of the previous decision, on which it was to a great extent based, is somewhat weakened by the decision of the same learned Judges in the case of *Tarujan Bibee v. Asamuddi Bepari* (3).

We think that the findings of the Magistrate are tantamount to a decision that the second party is in possession of the six annas of the disputed market, and, that being so, we think the Magistrate had no jurisdiction to pass orders under section 145 of the Criminal Procedure Code. He cannot decide under that section the method by which the possession is to be exercised, or the agency by which the person in possession is to collect the profits. The Rule is accordingly made absolute. The costs, if paid, will be refunded to the petitioners.

Rule absolute.

(1) (1906) 10 C. W. N. 1088.

(2) (1899) I. L. R. 27 Calc. 259.

(3) (1900) 4 C. W. N. 426.

INSOLVENCY JURISDICTION.

Before Mr. Justice Fletcher.

1909
July 23.

In re OFFICIAL ASSIGNEE'S COMMISSION.*

Official Assignee—Sale of Insolvent's Estate—Commission on sale of mortgaged property—Indian Insolvency Act (11 & 12 Vic. c. 21) ss. 19, 21, 31—Supreme Courts' Officers Act (XV of 1848) ss. 1, 2—Practice.

On the application of the mortgagee, an order was made in Insolvency proceedings directing the Official Assignee to sell certain immoveable properties belonging to an insolvent, but which were subject to a mortgage :—

Held, that the Official Assignee was not entitled to charge a commission out of the insolvent's estate on the full value of the properties sold, but only on the amount coming to the insolvent's estate.

Held, also, that although the practice of this Court for over thirty years had apparently been to allow such commission, it was contrary to the provisions of the Indian Insolvency Act (11 & 12 Vic. c. 21) and the Supreme Courts' Officers Act, 1848.

In re Howard Brothers (Insolvents) (1) commented on.

THE facts are as follows. Certain immoveable properties belonging to an insolvent were under a mortgage. The mortgagee, with the consent of the Official Assignee, applied for an order authorising the said Assignee to sell the mortgaged property in order that the mortgagee might be paid off. The order was made, but when it was drawn up the Official Assignee found that instead of being allowed the usual commission on the full value of the mortgaged property, he had been allowed commission only on the amount actually coming to the insolvent's estate. An application was, therefore, made for leave to speak to the minutes, so that the order might be altered and commission allowed on the full value of the mortgaged properties.

Mr. Zorab (*Mr. Camell* with him), for the Official Assignee. For over thirty years the Court allowed the Official Assignee

* Application in the matter of Banku Behari Ghose, an Insolvent.

(1) (1874) 13 B. L. R. App. 9.

a commission on the full value of the properties sold by him, whether they were mortgaged properties or not.

[FLETCHER J. Is he entitled to a commission except on the amount coming to the insolvent's estate ?]

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Yes, he has been allowed the usual commission on the full value of the mortgaged property. The practice is now well settled and ought not to be disturbed: *Nobokishore Sarma Roy v. Hari Nath Sarma Roy* (1) and *Kusum Kumari Roy v. Satya Ranjan Das* (2). When he sells these properties, he does not do so in his character as Official Assignee. He does so in the character of an auctioneer. The Court is not bound to select the Official Assignee to sell such properties, but generally he is appointed he being the most convenient person. This practice of paying the commission on the full value sprang up since 1794. It is true that this practice has not been uniform till 1875. There are, however, some orders even before this. The only reported case on this point is *In the matter of Howard Brothers (Insolvents)* (3).

[FLETCHER J. It does not seem that the provisions of the Supreme Courts' Officers Act of 1848 were placed before the Court in that case.]

When the Official Assignee is acting under an order of the Court, that Act would not affect him. [Refers to a large number of instances occurring since 1874, where such commission was allowed.]

Cur. adv. vult.

FLETCHER J. This case has been mentioned on the application of the Official Assignee to speak to the minutes of an order made in Insolvency Proceedings directing the Official Assignee to sell certain immoveable properties which are subject to a mortgage. The order was made on the application of the mortgagee with the consent of the Official Assignee. The reason that the Official Assignee has required that the

(1) (1884) I. L. R. 10 Calc. 1102, 1110. (2) (1903) I. L. R. 30 Calc. 999, 1003.

(3) (1874) 13 B. L. R. App. 9.

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minutes should be spoken to is on account of the Chief Clerk having drawn the minutes of the order as allowing the Official Assignee's commission only on the amount coming to the insolvent's estate, whereas the Official Assignee claims that he is entitled to commission out of the insolvent's estate on the full value of the property.

The matter is one of considerable importance. In some cases the commission that has been paid to the Official Assignee in respect of the sale of the immoveable property of an insolvent out of the insolvent's estates when the same has been subject to mortgages, has worked out at a very high percentage. The Official Assignee says, however, that he has been allowed by the Court for so many years to charge these commissions that the settled practice to allow him the commission must be taken to be valid.

Now, the office of the Official Assignee is constituted under the Indian Insolvency Act, 1848. In that Act there are three sections that are most important with reference to this application. The first is section 19 and is as follows :—

“And be it enacted, that no remuneration whatever,” (and to my mind the word remuneration is very important) “whether in the shape of commission or otherwise, shall be received by any Assignee, except in the manner nor beyond the extent hereinafter allowed ; (that is to say) the Court may allow a fair remuneration to the Assignee or Assignees out of the sum to be distributed as dividends, and make an order accordingly.”

The other two sections are sections 21 and 31. Section 21 defines the duties of the Official Assignee upon the adjudication and directs that “he shall, with all convenient speed, take possession by himself or by means of messengers of the Court, or by other fit and proper persons, of all the real and personal estate and effects of the insolvent of which immediate possession may be obtained, and shall use his best endeavours to seize, obtain, recover, and reduce into possession, as speedily as possible, the rest of such estate and effects, and all debts, claims, and choses in action, which by virtue of his appointment

under this Act, and of the vesting order or adjudication, he shall have been empowered to obtain, recover, and get in."

Section 31 sets out the duties of the Assignee as to realisation of the insolvent's estate and runs as follows:—

"The Assignee or Assignees shall, with all convenient speed, make sale of the property and effects of the insolvent: provided nevertheless, that the Court shall have full power and authority, upon the application of any insolvent, or only creditor or mortgagee of such insolvent, to delay or postpone the sale of any property; and to make such other order respecting the same as to such Court shall seem meet."

The statute, therefore, provides that it is the duty of the Official Assignee to sell the property of the insolvent with all convenient speed, and as to his remuneration for doing so, the Act says the only reward that he is to get for so doing is a commission on the amount to be distributed as dividends. If, for the purpose of realising the estate more favourably, it is necessary for the Official Assignee to join with the mortgagee in selling the property, there can be little doubt that it is his duty to do so. There can be little, if any, more trouble in selling the equity of redemption in a property than in selling the property free from incumbrance. I can see no warrant for saying that the Official Assignee is entitled to calculate his commission on the full value of the mortgaged properties. In fact Mr. Zorab, for the Official Assignee, had to admit that the Official Assignee could not claim his commission as Official Assignee, but he claimed it *qua* auctioneer. But on that view of the case, the Official Assignee is met with the provisions of the Supreme Courts' Officers Act from which provisions the Court cannot dispense him. Besides which it can hardly be suggested that a trustee having power to sell by auction can employ himself as the auctioneer and charge the trust estate with his commission as auctioneer. The only difficulty in the case is that the Official Assignee has been permitted for many years to take these commissions. Up to the year 1875, the orders produced before me appear to vary. From that date apparently the orders have allowed the Official Assignee to take the

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commission now claimed. The only reported case, however, appears to be *In re Howard Brothers, Insolvents* (1), and the attention of the Court in that case was not called to the Supreme Courts' Officers Act. Having regard to the very express words used both in the Indian Insolvency Act, 1848, and the Supreme Courts' Officers Act, I think that the order as drawn up by the Chief Clerk is correct.

This application, therefore, fails and must be dismissed.

Application refused.

S. C. R.

(1) (1874) 13 B. L. R. App. 9.

CRIMINAL REVISION.

Before Mr. Justice Gore and Mr. Justice Ryles.

MALIK PRATAP SINGH

v.

KHAN MAHOMED.*

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July 24.

High Court, jurisdiction of—Power to revise orders of discharge by Presidency Magistrates, and to direct further inquiry—Criminal Procedure Code (Act V of 1898) ss. 423, 439—Charter Act (24 and 25 Vic., c.104) s. 15.

The High Court has power, under section 439 read with section 423 of the Criminal Procedure Code, to revise an order of discharge passed by a Presidency Magistrate and to direct a further inquiry, if there are good reasons for doing so, although no question of jurisdiction arises in the case.

Hari Dass Sanyal v. Saritulla (1), *Colville v. Kristo Kishore Bose* (2), *Dwarka Nath Mondul v. Beni Madhab Banerjee* (3) and *Emperor v. Varjivandas* (4) followed. *Bellew v. Parker* (5) referred to.

Charoobala Dabee v. Barendra Nath Mozumdar (6), *Kedar Nath Sanyal v. Khetra Nath Sikdar* (7) and *Debi Bux Shroff v. Jutmal Dungarwal* (8) discussed and dissented from.

The High Court cannot interfere, under section 15 of the Charter Act, with the order of a subordinate Court on the ground of an error in law, but only for

* Criminal Revision No. 710 of 1909, against the order of P. N. Dutt, Fourth Presidency Magistrate of Calcutta, dated May 27, 1909.

(1) (1888) I. L. R. 15 Calc. 608.

(5) (1903) 7 C. W. N. 521.

(2) (1899) I. L. R. 26 Calc. 746.

(6) (1899) I. L. R. 27 Calc. 126.

(3) (1901) I. L. R. 28 Calc. 652, 667.

(7) (1907) 6 C. L. J. 705.

(4) (1902) I. L. R. 27 Bom. 84.

(8) (1906) I. L. R. 33 Calc. 1282.

an error affecting jurisdiction, that is, either a want or refusal of jurisdiction or an illegality in the exercise of it.

Tej Ram v. Harsukh (1) and *Corporation of Calcutta v. Bhupati Roy Chowdhry* (2) referred to.

Where on the admission of the accused an offence of criminal misappropriation might have been established, and the Magistrate did not consider or elicit matters of vital importance in the case:—

Held, that there had been no proper inquiry into the charge, and that there were *prima facie* grounds for directing a further inquiry.

Ram Logan Dhobi v. Inglis (3) and *Hari Moodi v. Kumode* (4) distinguished

THE petitioner, who was a military contractor at Rawalpindi, entrusted the opposite party, Khan Mahomed, from time to time, with various sums of money, amounting to Rs. 3,550, for the purchase of Hessian cloth and other articles as a commission agent. It appeared that the latter deposited Rs. 300 with the Budge-Budge Mills and spent another sum in the business he undertook, leaving a balance of Rs. 2,774 in hand, which, it was alleged, he refused to return though called upon to do so. The police thereupon charged him with cheating and criminal breach of trust under sections 420 and 409 of the Penal Code before the Chief Presidency Magistrate, and the case came on before the Fourth Magistrate for trial. He admitted before the latter the receipt of Rs. 3,550 for the purposes specified by the complainant, and a present credit balance of Rs. 2,774 which, he stated, was never demanded from him by the petitioner. On the 1st May 1909 the Magistrate held that the charge of cheating would not lie on the facts, but he found that the accused was entrusted with the money by the complainant within the meaning of section 405 of the Penal Code, and that he had spent part of it not in the way he should have done but in distinct violation of the terms of the trust. He, however, referred the question of the liability of the accused to the High Court under section 432 of the Criminal Procedure Code. On the return of the reference with the directions of the High Court that it was open to him to frame either alternative charges under sections 409 and 420 of the Penal Code, or a charge under section 409 thereof, according to the state

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(1) (1875) I. L. R. 1 All. 10.

(3) Unreported.

(2) (1898) I. L. R. 26 Cal. 74.

(4) Unreported.

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of the evidence, the Magistrate re-called the complainant who stated that he had asked Khan Mahomed for the money but had not been paid, and, relying on the unreported rulings of *Ram Logan Dhobi v. Inglis* (1), decided on the 13th September 1907, and *Hari Moodi v. Kumode* (2), decided on the 21st August 1907, held that misappropriation or conversion to his own use was not proved, and he discharged the accused before him, under section 253 of the Code, by his order dated the 27th May. The petitioner then moved the High Court and obtained the present Rule.

Babu Narendra Kumar Bose, for the petitioner. The High Court has power to call for the records of a Presidency Magistrate under section 435 of the Code, and to direct a further inquiry under section 439 read with section 423 (1) (a), or at least (1) (d) : *Hari Dass Sanyal v. Saritulla* (3), *Colville v. Kristo Kishore Bose* (4), *Emperor v. Varjivandas* (5).

Babu Manmatha Nath Mukerjee, for the opposite party. The High Court has power to interfere only under section 15 of the Charter Act and not under the Code: *Kedar Nath Sanyal v. Khetra Nath Sikdar* (6), *Debi Bux Shroff v. Jutmal Dungarwal* (7) and *Charoobala Dabee v. Barendra Nath Mozumdar* (8). The question did not arise before, and was not decided by, the Calcutta Full Bench in the case cited.

COXE AND RYVES JJ. This is a Rule on the Chief Presidency Magistrate of Calcutta and the opposite party to show cause why the order of discharge of Khan Mahomed, passed by the learned Fourth Presidency Magistrate, dated the 27th May last, should not be set aside and a further inquiry ordered.

On behalf of Khan Mahomed it has been argued that this Court should not interfere under the Charter Act in the circumstances of this case, and that it has no power under the provisions of the Criminal Procedure Code to order further

(1) Unreported.

(2) Unreported.

(3) (1888) I. L. R. 15 Calc. 608.

(4) (1899) I. L. R. 26 Calc. 746.

(5) (1902) I. L. R. 27 Bom. 84.

(6) (1907) 6 C. L. J. 705.

(7) (1906) I. L. R. 33 Calc. 1282.

(8) (1899) I. L. R. 27 Calc. 126.

inquiry in a case in which a Presidency Magistrate has discharged an accused person, and reliance has been placed on three rulings of this Court to which we shall refer later.

We think it must be conceded that we can only interfere, if at all, under section 439 of the Code. There is here no question of jurisdiction. If the Magistrate has erred, his error is merely one of law. It was held in *Tej Ram v. Harsukh* (1), which was followed in *Corporation of Calcutta v. Bhupati Roy Chowdhry* (2), that a High Court cannot interfere, under section 15 of the Charter Act, with the order of a Court subordinate to it on the ground of an error in law. There must be an error that affects jurisdiction—either want of jurisdiction, or a refusal of jurisdiction, or an illegality in the exercise of jurisdiction. This view is also expressed in *Kedar Nath Sanyal v. Khetra Nath Sikdar* (3).

As to our powers under the Criminal Procedure Code, apart from the case law, we would have had no hesitation whatever in holding that this Court has ample powers to interfere. Section 435 enables us to call for the record of any proceeding of any subordinate Criminal Court, and it is beyond doubt that the Court of a Presidency Magistrate is such a Court. Having called for and received such record, our powers of disposing of the case are enumerated in section 439, and we are enabled to exercise “any” of the powers conferred on a Court of Appeal by section 423, among other sections. One of the powers conferred on this Court as a Court of Appeal is the power of directing that an accused be retried or committed for trial. It seems to be quite clear that in a case in which a Presidency Magistrate acquits an accused person, this Court may, in the exercise of its revisional jurisdiction, for proper reasons, set aside the order of acquittal and order a retrial or commitment to the Court of Sessions: *Bellew v. Parker* (4). It would be strange if the Legislature enabled us thus to interfere in the case of an acquittal, but, nevertheless, gave us no power of interference in the case of an order of discharge.

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(1) (1875) I. L. R. 1 All. 101.

(3) (1907) 6 C. L. J. 705.

(2) (1898) I. L. R. 26 Cal. 74.

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The cases on which reliance has been placed are *Kedar Nath Sanyal v. Kheta Nath Sikdar* (1), *Debi Bux Shroff v. Jutmal Dungarwal* (2) and *Charoobala Dabee v. Barendra Nath Mozumdar* (3).

In *Kedar Nath Sanyal v. Kheta Nath Sikdar* (1) the application to this Court was made under section 437 of the Code of Criminal Procedure, and it was there held that that section had no application to a Presidency Magistrate. In *Debi Bux Shroff v. Jutmal Dungarwal* (2) it was held that "this Court cannot direct a further inquiry under section 437, neither have we power to interfere under section 439 of the Code." But there, as the report says, it was not contended that this Court could interfere under either of these sections. The argument of the learned Advocate-General in support of the Rule rested on the assumption that this Court could interfere only under section 15 of the Charter Act. This case is, therefore, not a strong authority on the question now raised, and the *dictum* that this Court could not interfere under the provisions of the Code may be regarded as *obiter*. *Charoobala Dabee v. Barendra Nath Mozumdar* (3), however, is a distinct authority for the proposition that this Court cannot interfere under the Code. On page 129 of the report, the *ratio decidendi* is expressed as follows:—"Section 439 confers on the High Court, as a Court of Revision, all the powers of an Appellate Court under section 423. But section 423 does not enable a Court of Appeal to direct that further inquiry be made into a case in which an order of discharge or dismissal may have been passed. Section 423 confers a power to direct further inquiry only in respect of a case of an appeal from an order of acquittal, and that this power is so limited is shown by an express enactment in section 437 to provide for such orders being passed." This is the only reason that has ever been assigned for the view that the High Court cannot order further inquiry after discharge by a Presidency Magistrate, and it may reasonably be inferred that it was for this reason

(1) (1907) 6 C. L. J. 705.

(2) (1906) I. L. R. 33 Calc. 1282.

(3) (1899) I. L. R. 27 Calc. 126.

that the learned Judges held in the two other cases cited that the High Court could not interfere under the Code. Exactly the opposite view was taken in *Colville v. Kristo Kishore Bose* (1), and in an unreported case of this Court which is referred to in the judgment in *Charoobala Dabee v. Barendra Nath Mozumdar* (2). Under these circumstances, we would have expected that the learned Judges who decided this latter case would have referred the question to a Full Bench, and we would have thought it necessary now so to refer it, if we did not think that a Full Bench of this Court had already decided the point.

In the Full Bench case of *Dwarka Nath Mondul v. Beni Madhab Banerjee* (3), Ghose J., at page 667, is reported to have said—"It is, however, said that sections 436 and 437 do not apply to Presidency Magistrates [see the observations of the learned Chief Justice in *Queen-Empress v. Dolegobind Dass* (4)], but, conceding that this is so, there can be, I think, no doubt that sections 435 and 439 are applicable; and they confer upon the High Court the power of sending for the record of any inferior tribunal, and reversing the order of the Magistrate, including the power of ordering a further inquiry in the case of an improper discharge. And this was the view that was adopted in respect to an order made by a Provincial Magistrate in the Full Bench case of *Hari Dass Sanyal v. Saritulla*" (5). The learned Judge then goes on to deal with the case of *Charoobala Dabee v. Barendra Nath Mozumdar* (2) and observes: "I am here confronted by certain observations of Sir Henry Prinsep and Hill JJ. in the case of *Charoobala Dabee v. Barendra Nath Mozumdar* (2) where, in referring to the power of the High Court under section 439 read with section 423, they stated that the latter section 'does not enable a Court of Appeal to direct that further inquiry be made into a case in which an order of discharge or dismissal may have been passed.'" And he proceeds to point out that that view, which, as we have pointed out,

(1) (1899) I. L. R. 26 Calc. 746.

(3) (1901) I. L. R. 28 Calc. 652.

(2) (1899) I. L. R. 27 Calc. 126.

(4) (1900) I. L. R. 28 Calc. 211.

(5) (1888) I. L. R. 15 Calc. 608.

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is the real basis of all the decisions that we have quoted, is opposed to the view of the Full Bench in *Hari Dass Sanyal v. Saritulla* (1).

It has been argued, however, that in this latter case the present question was not before the Full Court. Wilson J. in delivering his judgment, with which four other learned Judges of this Court concurred, stated that the three questions before the Court were—“(i) On what grounds is an order of discharge made under section 209 or section 253 liable to be set aside by a Court of Revision? (ii) What Courts have jurisdiction to set it aside, and (iii) What orders are proper to be made if an order of discharge is to be set aside;” and he came to the conclusion that “the High Court, under section 423 embodied in section 439, can set aside the order of discharge, and direct a charge to be framed and tried by the proper Court. It can, under section 437, and probably also under section 439, order a further inquiry instead of a committal.” These observations are perfectly general, and we think apply equally to all orders of discharge passed by subordinate Criminal Courts. In the Bombay High Court in *Emperor v. Varjivandas* (2), the ruling of this Court in *Colville v. Kristo Kishore Bose* (3) was followed, and the opposite ruling in *Charoobala Dabee v. Barendra Nath Mozumdar* (4) was dissented from, and in that case also, the decision of the Full Bench in *Hari Dass Sanyal v. Saritulla* (1) was relied upon. For these reasons, I think we have full power under the Criminal Procedure Code to order a further inquiry in this case, if there appear good reasons for so doing.

The complainant, Malik Pratap Singh, complained against Khan Mahomed of having cheated him in respect of a sum of Rs. 3,550 on the 4th and 5th of December 1908 and on the 8th of January 1909, at 37 Ezra Street, by false representation. The case was instituted by the police under section 420 of the Indian Penal Code, and was so regarded by the learned Presidency Magistrate. The complainant and a large number of witnesses were examined for the prosecution, and the pro-

(1) (1888) I. L. R. 15 Calc. 608.

(2) (1902) I. L. R. 27 Bom. 84.

(3) (1899) I. L. R. 26 Calc. 746.

(4) (1899) I. L. R. 27 Calc. 126.

secution case was closed on the 29th April 1909. Thereupon, the learned Magistrate wrote out an order submitting the case for the opinion of this Court under section 432 of the Criminal Procedure Code. It appeared to him to be very doubtful whether the charge of cheating under section 420 could possibly lie, but he seemed to be of opinion that a charge under section 409 might be sustained. He says—"I think in this case the accused was entrusted with the money by the prosecutor within the meaning of section 405 of the Indian Penal Code, and he spent part of it, namely, Rs. 2,774, not in the way he should have done but in distinct violation of the terms of the trust or the contract." Throughout the whole of the inquiry no question was asked bearing on the issue as to whether the accused had misappropriated the complainant's money. This Court returned the Reference to the learned Presidency Magistrate pointing out that it did not strictly arise under section 432, but that it was open to him to charge the accused in the alternative under sections 420 and 409, or under section 409, if the evidence disclosed that offences under these sections or either of them had been committed. He, thereupon, recalled the complainant on the 14th May, and the complainant then stated that he had asked the accused for the money and that he had not been paid. No further inquiry seems to have been made, and on the 27th May the learned Magistrate decided that, in the absence of a definite direction from this Court, he was bound to rely on two unreported cases which he set out in his order and discharge the accused. In the first case, all that was proved was that the *dhobi* had not returned some clothes which the complainant said he had given to him to wash. There was no finding that the *dhobi* had converted them to his own use. The fact that when charged he, to save himself, falsely denied that he had received the clothes, would not necessarily establish his guilt. He might have lost them or sent them to another customer by mistake. It does not appear he denied receipt before the institution of the case. In the second case, there was no finding in the lower Court's judgment as to any dishonest misappropriation by the accused or conversion to his

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own use of the ornaments said to have been pledged by the complainant. In the absence of such a finding no conviction could be had. The ruling does not lay any general rule of law. It seems to us that the facts on which those two cases were decided are very different. In this case, the accused has admitted that he received Rs. 3,550 for the purpose of purchasing specific articles, that he only spent a small amount of that money in purchasing a few of those articles, and he further admits that the balance is still with him. The reason why he states he did not spend all the money on the objects for which it was given to him is that the complainant telegraphed to him stopping him. He admits that the rest of the money is in his hands, but denies that the complainant ever asked him to return it. Under these circumstances, a charge of criminal misappropriation under section 409 of the Indian Penal Code may be established. But we think that there has been no proper inquiry into this charge. There is apparently some evidence that the accused absconded, a fact which, if proved, might have an important bearing on the question whether he had misappropriated the money, but the Magistrate apparently has not considered this evidence, nor has he attempted to elicit when and under what precise circumstances the demand for the money, if any, was made, and what answer or explanation was then given by the accused. These points are of vital importance, and when they have been lost sight of we think there are *prima facie* grounds for holding that further inquiry should be held.

We, therefore, order that the record be returned to the learned Presidency Magistrate, and direct him to inquire further into the charge under section 409 of the Indian Penal Code.

F. H. M.

Rule absolute.

PRIVY COUNCIL.

ABHIRAM GOSWAMI

v.

SHYAMA CHARAN NANDI.

P.C.*
1909March 4, 17,
18, 19;
July 30.

[On appeal from the High Court at Fort William in Bengal.]

Hindu Law—Endowment—Creation of Endowment—Proof of Dedication to Idols—Alienation of endowed property—Construction of grant of Debutter property—Ancient Document—Evidence Act (I of 1872) s. 90—Power of Mohant to grant lease in perpetuity at fixed rent—Landlord and Tenant—Limitation Act (XV of 1877) Sch. II, Arts. 134, 144—Bona fide Purchaser.

The origin of title to the property in suit was a sanad of 1787 granted by the Raja of Pandra to the predecessor in title of the plaintiff, the sebit of a shrine managed by Goswamis among whom the office of Mohant had descended for more than 100 years by the rule of lineal primogeniture, in the following terms:—

“To the remembered and abode of all blessings, Sri Bichitranda Mohant Goswami, of good character. This deed of pottah of *debutter* property is executed to the following effect. I do grant to you by way of lakheraj *debutter* the entire mouzah of Gorfalbari in pergunnah Pandra By bestowing your blessings on us you do enjoy and possess the same with fresh felicity. If I or any of my heirs ever dispossess you, the dispossession shall be ineffectual.”

The evidence in the case showed that the donee received the gift as one for the service of the particular idols whose sebit he was, and that the income of the mouzah had ever since been entirely appropriated for that service. In 1860 the then Mohant describing himself as “brittibhogi-holder of *debutter*,” granted to the predecessor in title of the defendants a *mokurari pottah*, or permanent lease, of the mouzah in which it was described as “my long-standing ancestral lakheraj *debutter* property endowed for the service of the deity.” In a suit brought to set aside the lease as being beyond the powers of the Mohant and therefore void, it was contended by the defendants that though the grant was to the Mohant and “by way of lakheraj *debutter*,” there was no complete or specific dedication of the mouzah to the service of any idol, but that the gift was to the Mohant personally and descendible to his heirs:—

Held, by the Judicial Committee (reversing the decision of the High Court) that, under the circumstances of, and on the evidence in, the case, the mouzah was *debutter* property in the sense of having been dedicated to the worship of the idols represented by the Mohant to whom it had been originally granted. Though the mere fact of the proceeds of any land being used for the support of an idol may not be proof that that land formed an endowment for the purpose, yet it was a fact that might well be taken into consideration, when, as in this

* *Present*: LORD ATKINSON, LORD COLLINS, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

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case, the intention of the founder had to be gathered from an ancient document expressed in ambiguous language.

Muddun Lall v. Komul Bibee (1) followed.

There was no allegation of any special circumstances of necessity to justify the grant of the lease which was subject to a fixed rent-charge, payment of which had all along been made to the Mohant :—

Held, that the power of a Mohant to alienate *debuttar* property being, like the power of a Manager for an infant heir, limited to cases of unavoidable necessity [*Prosunno Kumari Debya v. Golab Chand* (2)], a permanent lease at a fixed rent, though adequate at the time, was “a breach of duty in the Mohant,” and on the most favourable construction could only enure for the life of the grantor and was not binding on his successors.

Shibessouree Debia v. Mothooranath Acharjo (3) followed.

It was also contended that a mokurari lease was tantamount to a conveyance in fee simple, and that the lessees must, therefore, be treated as “purchasers” within the meaning of Article 134 of Schedule II of the Limitation Act (XV of 1877), and the suit was consequently barred by lapse of time, and the High Court so decided :—

Held (reversing that decision) that the words “purchased for a valuable consideration” in that Article meant that the ownership of the property sold had been absolutely transferred from the vendor to the purchaser in consideration of the price. But a lease in perpetuity left some interest in the lessor, and such a lease, though permanent, was forfeitable: *Kally Dass Ahiri v. Monmohini Dassce* (4). The purchaser must be the purchaser of an absolute title. The defendants were, therefore, not purchasers under Article 134, and the suit was not barred.

APPEAL from a judgment and decree (17th February 1906) of the High Court at Calcutta which reversed a judgment and decree (29th June 1905) of the Subordinate Judge of Manbhum.

The plaintiffs were the appellants to His Majesty in Council.

The suit out of which this appeal arose was brought on 29th September 1904 by the first appellant, Abhiram Goswami (a minor suing by his mother and next friend Nrittomoyi Debi), the Mohant of a shrine of two Hindu idols known as Raghunath Jiu and Durga Mata, and Messrs. Burn and Company, the lessees of the first plaintiff. The plaint sought a declaration that a village called Gorfalbari granted in 1787 by the Raja of Pandra to the predecessors in title of the first plaintiff, for the support of the idols was *debuttar* property; and that

(1) (1867) 8 W. R. 42, 43.

(3) (1869) 13 Moo. I. A. 270, 275.

(2) (1875) 14 B. L. R. 450;

(4) (1897) I. L. R. 24 Calc. 440, 447.

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two leases of portions of the village, dated 6th February 1860, and 2nd November 1896, under which the defendants held, were invalid as being beyond the powers of the then Mohant to grant; and prayed for possession of the village, or in the alternative for a declaration that in any event no title to any "underground rights" passed to the defendants under the said leases.

The defence was that the suit was barred by limitation; and that the village in suit was not *debttar* property, but the personal estate of the Mohant who granted the leases which it was sought to set aside.

The Subordinate Judge held that the suit was not barred by limitation; that the sanad of 1787 was an ancient document and had come from proper custody; that the village in suit was shown to be *debttar* property; and that the Mohant for the time being had no power to alienate the property and the leases, under which the defendants held, were therefore invalid. He accordingly decreed possession of the village to the plaintiffs with mesne profits and costs.

On appeal a Divisional Bench of the High Court (SIR F. MACLEAN C.J. and MR. JUSTICE GEIDT) held that the suit was barred by limitation; that the village in suit was not *debttar* property, but was the personal property of the family to which the Mohant belonged; and that the lease, dated 6th February 1860, conveyed to the lessee a right to the subsoil and to minerals. The High Court, therefore, reversed the decision of the Subordinate Judge and dismissed the suit with costs.

The facts of the case are fully set out in the report of the appeal to the High Court, and in the judgment of that Court now appealed from which will be found in I. L. R. 33 Calc. 511.

Whilst this appeal was pending Abhiram Goswami died, and his mother Nrittomoyi was allowed by the Court to represent him on this appeal.

On this appeal,

DeGruyther, K.C., and G. E. A. Ross, for the appellants, contended that the village in suit was "*debttar*" property.

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By the sanad of 1787, which was an ancient document and produced from proper custody, the village was granted as "*debuttar*." Reference was made to Wilson's Glossary, page 134, to show that "*debuttar*" meant the property of an idol, and to the same authority at page 93 to show that the word "*bramottar*" would properly have been used, had it been the intention that the property conveyed should be the "property of the Mohant." The grant, therefore, was intended to be one to the idols. There was no provision in the sanad for the succession of the Mohants which would have been the case if the gift had been intended to be the personal property of the Mohant; but which was unnecessary in the case of a gift to an idol which was a corporation sole. The reference to the possibility of dispossession by the grantor and the statement that it would be ineffectual confirmed the construction put upon the grant by the appellants as did the recital describing the property in the lease of 1860. The best evidence as to whether the property was the endowed property of the idols was the manner in which it had been dealt with from the time of the grant in 1787 up to the present time; and it would be found that it had always been treated as endowed and not private property. Evidence of members of the family showed that it was *debuttar*; that the proceeds of it had all along been spent for the purposes of the sheba; and that the *debuttar* property of the idols, including the village in suit, always was and is in the possession of the Mohant alone. Had it been the personal property of Bichitrananda, all his descendants would have taken shares of it; and the fact that this did not happen proved conclusively that the village was the property of the idols, and never the private property of the Mohant himself. It was submitted, therefore, that the High Court was wrong in holding that the village in suit was not *debuttar* property.

It was also contended that the lease of 6th February 1860, if intended to be a transfer in perpetuity, and if the property was *debuttar*, was beyond the powers of the Mohant to execute: it was neither alleged nor proved that the lease was granted for legal necessity which alone would justify a Mohant in so

alienating it. That being so, the lease should be held not to give a permanent right of occupancy. Reference was made to *Mayandi Chettiyar v. Chokkalingam Pillay* (1).

It was further contended that the suit was not barred by limitation. Article 144 of Schedule II of Act XV of 1877 was said to bar it because the possession of the lessees became, on the death of Pranananda in 1891, adverse to Raghabananda, his successor in the Mohantship, and the suit had not been brought within twelve years from that date. But Raghabananda was insane from 1896 to the date of his death, 10th June 1900, and Abhiram, the plaintiff, his successor, was a minor up to the date of suit, 29th September 1904, so that, in that view, under section 7 of the Limitation Act (XV of 1877), the suit would be in time. Nor was it barred by article 134 of the Act which only applied, it was submitted, to a *bonâ fide* purchaser, whereas Ananga Mohini Debi, the lessee in this case, took the property with the knowledge that it was "*debttar*," and was therefore not a purchaser within the meaning of that article. For the same reason she was not an "assign for valuable consideration" within the meaning of section 10 of the Limitation Act. The lessee, moreover, did not under the lease acquire an absolute title, and it was held in the case of *Radhanath Das v. Gisborne & Co.* (2) that under section 5 of the old Limitation Act (XIV of 1859) which corresponded with article 134 of the present Act, that the word "purchased" in that section meant the acquisition of an absolute title as purchaser, and could not mean "mortgaged" or "leased"; so that article 134 was inapplicable to Ananga Mohini Debi and her representatives in title in the present suit. Reference was also made to *Ram Churn Tewary v. Protap Chunder Dutt Jha* (3); Limitation Acts (IX of 1871) section 10, and XV of 1877, section 10. But the original lessee and the present defendants, her successors in title, had paid the rent reserved under the lease regularly up to 1902, and if the property were *debttar* and the lease consequently void, they should be treated as being tenants from

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(1) (1904) I. L. R. 27 Mad. 291 ;
L. R. 31 I. A. 83.

(2) (1871) 14 Moo. I. A. 1.

(3) (1886) 2 C. L. J. 448.

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year to year of the Mohant, and then there was no question of adverse possession and therefore no limitation. A tenant could not convert his tenure (when it was invalid) into a proprietary tenure by being in possession for twelve years while paying the rent charge reserved by the lease. Reference was made to *President and Governors of Mogdalen Hospital v. Knotts* (1), *Ecclesiastical Commissioners v. Merral* (2), *Attorney General v. Davey* (3) and *Gnanasambanda Pandara Sannadhi v. Velu Pandaram* (4) was cited and distinguished. Tenancy under the Bengal Tenancy Act, and section 3, clause 3, as to the definition of "tenant" and sections 4 and 5, and Act X of 1859 (the Rent Act in force in Bengal before the Bengal Tenancy Act) were referred to. There were several kinds of tenants who had permanent interests in the property they held, but they were all only tenants, and not full proprietors; and their possession, however long, did not bar their lessor: see Bengal Tenancy Act, sections 5, 18, 20, 178 and 179; Transfer of Property Act (IV of 1882) sections 8, 108 clause (o) and 111 clause (g); and *Kally Dass Ahiri v. Monmohini Dassee* (5).

The lease of 2nd November 1896 was also void as being beyond the competence of the Mohant, and in that instance a further reason was that Raghabananda was the Mohant at the time of its execution, and he was proved to have been insane at the time and remained so until his death, and the evidence showed that, as the Subordinate Judge held, that lease was not properly executed.

Lastly, it was contended that the lease of 1860 did not include the minerals under the soil, but was only a lease for the purposes of cultivation. On its construction it was improbable that minerals and sub-soil rights were granted; no royalties were mentioned, and the "rights of various kinds" referred to would be only those *ejusdem generis*. Reference was made to *Crompton v. Jarratt* (6). Only the rights speci-

(1) (1879) L. R. 4 App. Cas. 324, 335.

(4) (1899) I. L. R. 23 Mad. 271;

(2) (1869) L. R. 4 Exch. 162, 166.

L. R. 27 I. A. 69.

(3) (1859) 4 De Gex & Jones, 136.

(5) (1897) I. L. R. 24 Calc. 440, 446 to 448.

(6) (1885) L. R. 30 Ch. 298.

fied in the lease were granted, not everything which might possibly be found in or under the land. A lease, however, permanent, did not convey missing rights unless they were definitely specified.

Sir R. Finlay, K.C., and *H. Cowell*, for the respondents, contended that there was no evidence of any valid dedication of the property in suit so as to tie it up in perpetuity; and that it was not shown on the evidence to be *debuttar* property. The High Court, and, it was submitted, rightly doubted the genuineness of the sanad of 1787. But even if genuine, there was, on the construction of the sanad, nothing to show that the property granted was *debuttar* and given to the idols. For all that the grant said, it might as well be a grant to the individual Mohant himself, and not a gift to the idols as the appellants contended. There was no sufficient evidence of any endowment or that the property was affected by any specified or definite trust. Reference was made to *Doorganath Roy v. Ram Chunder Sen* (1); Mayne's Hindu Law, 7th Edition, page 585, paragraph 439; 5th Edition, paragraphs 396, 397, 398; *Brojosoondery Debia v. Luchmee Koonweree* (2) as not supporting estates of a perpetual character in favour of idols.

On the construction of the lease of 1860, it was contended that it was a grant in perpetuity and for an adequate rental. Such a grant with such an annual payment by the grantee was a form of parting with landed property. It was called a *mukurari* lease and was in fact a grant in fee simple of the property conveyed, cases of *istemrari mukurari* grants were referred to showing that such grants could not be resumed at will, and that twelve years' adverse possession barred a suit to recover the property granted: *Tulshi Pershad Singh v. Ram Narain Singh* (3), *Bejoy Chunder Banerjee v. Kali Prosonno Mookerjee* (4) and *Himmut Bahadoor v. Sooneet Kooer* (5).

(1) (1876) I.L.R. 2 Calc. 341, 345, 348; (3) (1885) I. L. R. 12 Calc. 117, 129;
L. R. 4 I. A. 52, 54, 56. L. R. 12 I. A. 205, 213, 214.

(2) (1873) 15 B. L. R. 176, 178
(note).

(4) (1878) I. L. R. 4 Calc. 327, 329,
330.

(5) (1871) 15 W. R. 549, 550, 551.

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As to limitation it was contended that the suit was barred by article 134 of Schedule II of the Limitation Act, 1877. The defendants were "purchasers" under that article, and "assigns for valuable consideration" within the meaning of those words in section 10 of the Limitation Act; and they and their predecessors in title had held adverse possession of the property from the date of the execution sale, 14th December 1877, and the rights of the appellants, if any, had become extinguished under section 28 of that Act. Reference was made to *Gnana-sambanda Pandara Sannadhi v. Velu Pandaram* (1). The fact that there was a rent charge, which was paid all along, made no difference. The decision in the case of *President and Governors of Magdalen Hospital v. Knotts* (2) was opposed to those in *Attorney General v. Davey* (3) and *President, &c., of College of St. Mary Magdalen, Oxford v. Attorney General* (4).

It was also contended that the lease of 1860 on its true construction granted the rights to the minerals in and under the soil: the lease after reciting what was specifically granted concluded with the words, "and all rights of various kinds" which were large enough to include mineral rights: and that by the lease of 1896 the respondents acquired a valid title to the five bighas which had been excepted from the grant of 1860.

DeGruyther, K.C., in reply, contended that the idols were the beneficiaries, and the Mohant as Manager of the endowment applied the proceeds of the property to the support of the idols, referring to Mayne's Hindu Law, 7th Edition, page 582; *Manohar Ganesh v. Lakhmiram Govindram* (5); *Sathianama Bharati v. Saravanabagi Ammal* (6); *Mahomed v. Ganapati* (7); *Delroos Banoo Begum v. Ashgur Ally Khan* (8); *Doorga-nath Roy v. Ram Chunder Sen* (9); *Prosunno Kumari Debya v. Golab Chand Baboo* (10); and the Indian Trusts Act (II of 1882). Section 10 of the Limitation Act had no application

(1) (1899) I. L. R. 23 Mad. 271, 279;

L. R. 27 I. A. 69, 76.

(2) (1879) L. R. 4 App. Cas. 324.

(3) (1859) 4 DeGex & Jones, 136.

(4) (1857) 6 H. L. C. 189.

(5) (1887) I. L. R. 12 Bom. 247, 263.

(6) (1894) I. L. R. 18 Mad. 266, 274.

(7) (1889) I. L. R. 13 Mad. 277, 280.

(8) (1875) 15 B. L. R. 167.

(9) (1876) I. L. R. 2 Calc. 341, 347;

L. R. 4 I. A. 52, 55.

(10) (1875) L. R. 2 I. A. 145, 162.

to the present case ; there was no adverse possession and therefore *Bejoy Chunder Banerjee v. Kally Prosonno Mookerjee* (1) and *Himmud Bahadoor v. Sooneet Kooer* (2) were not applicable. The distinction between a lease in perpetuity and a sale was clear from the decision in *Kally Dass Ahiri v. Mon-mohini Dassee* (3).

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The judgment of their Lordships was delivered by

SIR ANDREW SCOBLE. The subject-matter of this litigation is a mouzah called Gorfalbari, in the district of Manbhum, and the main questions for consideration are, first, whether the mouzah is *debuttar* or *dewattar* property, and, secondly, whether, assuming it to be so, the Mohant of the endowment for the time being had power to grant a *mokurari pottah*, or permanent lease, of it.

July 30.

The relevant facts may be shortly stated. In the village of Achkoda is the shrine of two Hindu idols, known as Raghunath Jiu and Durga Mata, served by a family of Goswamis, among whom the office of Mohant has descended, for more than a century, by the rule of lineal primogeniture. In 1787, one Bichitrananda was Mohant, and the origin of the title to the mouzah is a sanad, dated on the 23rd December in that year, which is in the following terms :—

To the remembered and abode of all blessings, Sri Bichitrananda Mohant Goswami, of good character.

This deed of *pottah* of *debuttar* property is executed to the following effect.

Being in sound health and easy mind, I do grant to you by way of lakheraj *debuttar* the entire mouzah Gorfalbari, in pergunnah Pandra, together with all bills, jhils, waste and danga lands, jungles and culturable lands and whatever exists thereon. By bestowing your blessing on us, you do enjoy and possess the same with fresh felicity. If I or any of my heirs ever disposes you, the dispossession shall be ineffectual.

It was contended on behalf of the respondents that, although the grant was to the Mohant, and “ by way of lakheraj *debuttar*,” there was no complete or specific dedication of the mouzah to the service of any idol, but that the gift was to the

(1) (1878) I. L. R. 4 Calc. 327.

(2) (1871) 15 W. R. 549.

(3) (1897) I. L. R. 24 Calc. 440.

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Mohant personally, and descendible to his heirs, in return for blessings bestowed on the donor and his family. There is, no doubt, much force in this contention, but, however, ambiguously the intention of the donor may have been expressed, it is perfectly clear from the evidence in the case that the donee received the gift as a gift for the service of the particular idols whose shebait he was, and that the income of the mouzah has ever since been entirely appropriated to that service. The Subordinate Judge finds as a fact that "its proceeds have all along been spent for the maintenance of the sheba of the said idols," and there is no evidence at variance with this finding. The mere fact of the proceeds of any land being used for the support of an idol may not be proof that those lands formed an endowment for the purpose, *Muddun Lal v. Komul Bibee* (1), but it is a fact that may well be taken into consideration when, as in this case, the intention of the founder has to be gathered from an ancient document expressed, to say the least, in ambiguous language. *Contemporanea expositio est optima*.

But the case for the appellants does not rest on this consideration alone. In February, 1860, the then Mohant Pranandanda, describing himself as "Brittibhogi-holder of *debuttar*," granted to one Ananga Mohini Debi a *mokurari pottah*, or permanent lease, of the entire mouzah, with the exception of five bighas, which were reserved as "set apart as the place of repose for the deity." In this document the mouzah is described as "my long-standing ancestral lakheraj *debuttar* property endowed for the services of the deity." Under this grant, Ananga Mohini, and afterwards her husband, Magaram, had possession of the estate until 1877, when it was sold in execution of a decree for rent obtained by Pranandanda against Magaram, whose interest is now represented by the first three respondents. The five bighas reserved in the original pottah were granted to the same respondents on the same tenure by the three sons and the widow of Pranandanda by a lease, dated the 2nd November, 1896.

Upon these facts, the learned Subordinate Judge found that Gorfalbari was the *debuttar* property of the idols Raghu-nath Jiu and Durga Mata ; and the High Court, feeling a difficulty on this point, decided the case upon the question of limitation. Leaving the question of limitation aside for the moment, their Lordships are of opinion that the Subordinate Judge was right, and that Gorfalbari must be held to be *debuttar* property, in the sense of having been dedicated to the worship of the idols represented by the Mohant Bichitrananda.

The second question is whether, this being so, the Mohant had power to grant a *mokurari pottah* of the mouzah. It is well settled law that the power of the Mohant to alienate *debuttar* property is, like the power of the Manager for an infant heir, limited, to cases of unavoidable necessity : *Prosunno Kumari Debya v. Golab Chand* (1). In the case of *Doorganath Roy v. Ram Chunder Sen* (2) a *mokurari pottah* of *dewattar* lands was supported on the ground that it was granted in consideration of money said to be required for the repair and completion of a temple, for which no other funds could be obtained. But the general rule is that laid down in the case of *Shibessouree Debia v. Mothooranath Acharjo* (3) that, apart from such necessity "to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time, would be a breach of duty" in the Mohant. There is no allegation that there were any special circumstances of necessity in this case to justify the grant of the pottah of 1860, which on the most favourable construction enured only for the life-time of the grantor, Pranananda, who died in 1891, or of the pottah of 1896, which, at best, could only be deemed operative during the life-time of Raghabananda, who died in 1900. As regards Raghabananda, who succeeded his father as Mohant in 1891, the Subordinate Judge found that he became insane about two years before his father's death, and continued so to the

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(1) (1875) 14 B. L. R. 450 ;
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(2) (1876) I. L. R. 2 Calc. 341 ;
L. R. 4 I. A. 52.

(3) (1869) 13 Moo. I. A. 270, 275.

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time of his death. The High Court say that "he was apparently insane in 1892 and again in 1897, but the oral evidence as to his being insane in 1896, at the date of the lease, is far from convincing. . . . The better view seems to us that he was not insane in 1896." Their Lordships can find no satisfactory evidence of any lucid interval between the periods when he was undoubtedly a lunatic, and as his mental incapacity arose from an excessive habitual use of ganja, it is extremely unlikely that such an interval should have occurred. They agree with the Subordinate Judge's finding upon this point.

It remains to deal with the question of limitation, upon which the learned Judges of the High Court have rested their decision. The article in the Limitation Act applicable to this case is article 134, by which a period of twelve years from the date of purchase is fixed for suits "to recover possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards purchased from the trustee or mortgagee for a valuable consideration." The operation of this article is controlled by section 10 of the Act, which provides that—

No suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property shall be barred by any length of time.

"Statutes of Limitation, like all others, ought to receive such a construction as the language, in its plain meaning, imports": *Luchmee Buksh Roy v. Runjeet Ram Panday* (1). Now, what is the plain meaning of the words "purchased for a valuable consideration"? They mean that the ownership of the property sold has been absolutely transferred from the vendor to the purchaser in consideration of a price paid or secured by the purchaser to the vendor. Sir Robert Finlay, in his able argument for the respondents, contended that a *mokurari* lease is tantamount to a conveyance in fee simple, and that the lessee must therefore be treated as a purchaser within the meaning of the Limitation Act. But the distinction between the two transactions has been well pointed out by Jenkins, J., in his judgment in the case of *Kally Dass Ahiri v.*

Monmohini Dassee (1). "Because at the present day," says the learned Judge, "a conveyance in fee simple leaves nothing in the grantor, it does not follow that a lease in perpetuity here has any such result. . . . The law of this country does undoubtedly allow of a lease in perpetuity . . . A man who, being owner of land, grants a lease in perpetuity carves a subordinate interest out of his own, and does not annihilate his own interest. This result is to be inferred by the use of the word *lease*, which implies an interest still remaining in the lessor." He held, therefore, that, whether the Transfer of Property Act applied or not, such a lease is forfeitable, notwithstanding that it is permanent. In this opinion their Lordships concur, and it follows that they are unable to give to the Limitation Act the wider interpretation adopted by the High Court, and to treat the lessee as a purchaser under article 134 of the Act. The purchaser must be the purchaser of an absolute title.

For these reasons their Lordships are of opinion that the leases under which the respondents claim were valid only during the life-time of the Mohant by whom they were granted, and they will humbly advise His Majesty that this appeal ought to be allowed, the judgment of the High Court set aside with costs, and the decree of the Subordinate Judge restored.

The first and fourth respondents, who resisted this appeal, must pay the costs of it.

Appeal allowed.

Solicitors for the appellants : *Lowless & Co.*

Solicitors for the respondents : *Morgan, Price & Mewburn.*

(1) (1897) I. L. R. 24 Cal. 440, 447.

J. V. W.

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CRIMINAL APPELLATE.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Caspersz.*

1909
July 22.

ASHRUF ALI

v.

EMPEROR.*

*Opium, illegal possession of—Opium Act (I of 1878) s. 9 (c)—Possession of
railway receipt for an undelivered parcel of contraband opium.*

The possession of a railway receipt relating to an undelivered parcel of contraband opium lying in a railway office, under circumstances showing knowledge of its contents, constitutes possession of the opium within section 9, clause (c) of the Opium Act.

Kashi Nath Bania v. Emperor (1) discussed and followed.

THE appellant Ashruf Ali was tried and convicted by the Chief Presidency Magistrate, on the 22nd April 1909, under Act I of 1878, sections 9 and 10 of being in illegal possession of opium, and sentenced to a fine of Rs. 500 and in default to six months' rigorous imprisonment.

On 7th February 1909, the appellant, it was found, gave one Yad Ali a railway receipt for a parcel despatched from Madhubani to Calcutta, and asked him to send a trustworthy coolie to take delivery of it at the Howrah station. The receipt, which was dated the 4th February, purported to bear the names of Bachoo as consignor and Emam Sarif as consignee, and described the contents of the package covered by it as "one tin of ghee." It bore an endorsement in favour of a coolie, named Durgai, signed by one Akhin Sarif. On the following day the appellant went to Yad Ali and inquired about the parcel, and was informed by the latter that the coolie went to the Howrah station but did not find it there, and that he had gone to the East Indian Railway Parcels Office in Chowringhee Road for it.

* Criminal Appeal No. 484 of 1909, against the order of T. Thornhill, Chief Presidency Magistrate, Calcutta, dated April 23, 1909.

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In the meantime an Excise Sub-Inspector, upon receiving certain information, went to the Parcels Office and saw Durgai there with the receipt awaiting delivery. He took the receipt from him and obtained delivery of the package which, on being opened, was found to contain 20 seers of contraband opium. The Excise Officer then arrested Durgai who stated that he had got the receipt from Yad Ali, whereupon they went to the latter's shop and questioned him, and he immediately admitted having given the receipt to the coolie, but explained that he had received it from the appellant Ashruf. The appellant on being asked by the Excise Sub-Inspector about the receipt denied all knowledge of it, and contradicted the story of Yad Ali, but he was arrested and put on trial before the Chief Presidency Magistrate. It was contended for the defence that Yad Ali was the real culprit, and that the evidence of the witnesses who corroborated his story was false and concocted, but the Magistrate found possession of the receipt with the appellant and convicted him.

Mr. Asghur (Babu Manmatha Nath Mookerjee with him), for the appellant, argued on the facts that Yad Ali, who had been previously convicted under the Opium Act, was the guilty party, and that he now attempted to throw the blame on the appellant. The Court must determine the nature of the possession in the case: *Crown v. Kyte* (1). The case of *Kashi Nath Bania v. Emperor* (2) is distinguishable, as the accused there was the consignee himself and the receipt was discovered in his box. In this case the receipt was not found with Ashruf nor did he ever have possession of the opium.

Mr. Orr, for the Crown. The view of the facts taken by the Magistrate is correct. The receipt was in the appellant's possession, and his denial of it proves his knowledge of the contents of the parcel. He is, therefore, liable under the law as being in possession of the opium: *Kashi Nath Bania v. Emperor* (2).

(1) (1882) I. L. R. 9 Calc. 223.

(2) (1905) I. L. R. 32 Calc. 557.

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JENKINS C.J. AND CASPERSZ J. On the facts we are in agreement with the learned Magistrate, for we hold with him that the accused was in possession of the railway receipt. The question then arises whether that constitutes possession of the opium to which the railway receipt relates, so as to be an offence within section 9 of the Opium Act (I of 1878). If unfettered by authority, I should have been disposed to hold that there was no such possession, for, as I read the Act, it relates to possession of opium, and not of a receipt for the opium. However, there is a decision of this Court by which we are bound, *Kashi Nath Bania v. Emperor* (1), in which, on facts not fairly distinguishable from the present, it was held that possession of the railway receipt was possession of opium within the meaning of the section. It appears to me that this decision overlooks the distinction between "possession" and the "right to possession." But there the decision stands, and we are bound by it. We, therefore, dismiss this appeal.

E. H. M.

Appeal dismissed.

(1) (1905) I. L. R. 32 Calc. 557.

MATRIMONIAL JURISDICTION.

Before Mr. Justice Harington.

BOWEN v. BOWEN.*

1909
 Aug. 10.

Divorce—Alimony pendente lite, application for, after decree nisi—Indian Divorce Act (IV of 1869) s. 36.

Notwithstanding a decree *nisi* for dissolution of marriage, on the ground of the wife's adultery, the Court has power, under section 36 of the Indian Divorce Act, to order alimony *pendente lite* for the period between decree *nisi* and decree absolute.

Dunn v. Dunn (1) considered.

THIS was an application by the wife, against whom a decree *nisi* (2) for dissolution of marriage had been made, for an order for alimony, until the decree should be made absolute.

On the 7th January 1909, Mr. Bowen filed a petition for dissolution of marriage on the ground of his wife's adultery,

* Application in Original Civil Suit No. 1 of 1909.

(1) (1888) L. R. 13 P. D. 91.

(2) (1909) I. L. R. 36 Calc. 874.

and on the 14th June 1909, Harington J. pronounced the decree *nisi* (1).

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Mr. Bowen was a berthing master in the employment of the Commissioners of the Port of Calcutta, with an income of about Rs. 350 per month. Since the institution of the suit, by a private arrangement between the parties, the husband had made the wife an allowance at the rate of Rs. 100 a month for the months of January and February, and thereafter at the rate of Rs. 70 a month. On the 5th July 1909, Mr. Bowen tendered the sum of Rs. 35 as the amount due up to the date of the decree *nisi*, and refused to make any further allowance.

Mr. Asghur, for the applicant. Under section 36 of the Indian Divorce Act the wife may present a petition for alimony pending the suit, and the alimony shall continue until the decree is made absolute. Now the *lis* does not terminate with the decree *nisi*. Hence an application for alimony can be made after decree *nisi*: *Ellis v. Ellis* (2), *Foden v. Foden* (3), *Thomas v. Thomas* (4). The Indian Divorce Act does not deprive a guilty wife of alimony: *Thomas v. Thomas* (4). See Rattigan on Divorce, page 204.

Mr. Stokes, for the opposite party. In *Thomas v. Thomas* (4), alimony was allowed to the guilty wife only up to the pronouncement of decree *nisi*. It has been the uniform practice of the Courts in England to order a discontinuance of alimony after the wife's adultery has been proved: *Dunn v. Dunn* (5). Section 36 of the Indian Divorce Act does not contemplate an application for alimony being made after decree *nisi*. Under that section, if an order for alimony had been made before decree *nisi*, it would continue until the decree was made absolute.

Cur. adv. vult.

HARINGTON J. This is an application by the wife against whom a decree *nisi* for dissolution of marriage has been made for alimony until the decree is made absolute.

(1) (1909) I. L. R. 36 Calc 874..

(3) [1894] P. 307.

(2) (1883) L. R. 8 P. D. 188.

(4) (1896) I. L. R. 23 Calc. 913.

(5) (1888) L. R. 13 P. D. 91.

1909
BOWEN
v.
BOWEN.
HARRINGTON
J.

The husband has tendered the amount due up to the decree *nisi* and says that, inasmuch as the wife has been found guilty of misconduct, she has forfeited her right to receive any alimony subsequent to the decree *nisi*.

Alimony has been paid by the husband to the wife since the institution of the suit : that payment was made in pursuance of a private arrangement between the parties, no application was made in Court in respect of it.

The husband relies on the case of *Dunn v. Dunn* (1), in which it was held in England that where alimony *pendente lite* had been granted to a wife in a petition for divorce the right to such alimony ceased upon the wife's being found guilty of adultery.

But in this country the period during which alimony is payable is regulated by section 36 of the Divorce Act, which provides that it shall continue in the case of a decree for dissolution of marriage until the decree is made absolute. This provision, therefore, makes the law as laid down in *Dunn v. Dunn* (1) inapplicable in this country. Had alimony been granted it must by the express words of the statute have been continued to be payable until the decree is made absolute.

The decree *nisi* then under Indian law is no ground for depriving the wife of her alimony, and if it be no ground for depriving a wife of alimony, it appears to me equally to be no ground for refusing a wife the alimony which would otherwise be granted to her. The Indian Divorce Act contemplates the payment to the wife of alimony as long as she is in law a wife. Mrs. Bowen is still the wife of Mr. Bowen and should therefore be supported until she ceases, under a decree absolute, to fill that position. The parties are agreed that alimony, if payable, shall be at the rate of Rs. 70 a month.

The result is that the application must be granted with costs on scale 2.

J. C

Application allowed.

Attorney for the applicant : *G. K. Ghose.*

Attorneys for the opposite party : *Pugh & Co.*

ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

PRAKASH KUMAR MUKERJI

v.

HARVEY.*

1909

July 26.

Damages, suit for—Dogs likely to bite without provocation—Injury by Dogs at a public Recreation-ground—Liability of Owner of Dogs—Scienter.

The defendant's dogs which to the knowledge of his servant having the charge of such dogs were likely to bite people without provocation, were taken by such servant to a public recreation-ground. The plaintiff, a child of seven years of age, became frightened at the dogs and cried whereupon the dogs attacked and bit him severely :—

Held, that the defendant was liable in damages to the plaintiff.

Barnes v. Lucile, Ltd. (1) distinguished.

ORIGINAL SUIT.

THE facts are briefly as follows. The plaintiff, who was a child of about seven years of age, went out in company of his servant to the Ballygunge maidan, a public recreation-ground, where numerous children congregate every day. Seeing a number of large dogs at a little distance, the boy got frightened and cried. It was alleged that thereupon the dogs became excited and, two of these being loose, ran for the boy, while three others also attacked the boy after breaking away from their keeper who was holding them in chains. These dogs belonged to the defendant, Mr. A. D. F. Harvey, and the evidence was that the keeper told the servant not to bring the child any nearer. The boy having been severely bitten was taken by his parents for treatment to the Pasteur Institute at Kasauli. This was done as a precautionary measure, although there was nothing to show that the dogs were rabid at the time. The plaintiff afterwards filed this suit for damages.

Mr. H. D. Bose and Mr. S. K. Mullick, for the plaintiff.

Mr. H. Stokes and Mr. Hyam, for the defendant.

* Original Civil Suit No. 307 of 1909.

(1) (1907) 23 T. L. R. 389.

1909
PRAKASH
KUMAR
MUKERJI
v.
HARVEY.
—
FLETCHER J.

FLETCHER J. In this suit the plaintiff, Prakash Kumar Mukerji, who is a little boy of about seven years of age and a son of Panchanan Mukerji, an officer of the Appellate Side of this Court, sues one A. D. Fordyce Harvey to recover damages for injuries he sustained by reason of being bitten by the defendant's dogs.

It appears that Mr. Harvey has always kept dogs, and in August last he purchased a dog of the breed known as "Great Danes," two of which breed were produced in Court and which are dogs of great size. In September one Mr. Duft came to Calcutta and Mr. Harvey bought another "Great Dane" from him. Mr. Duft had three puppies of a similar breed of the age of about five months and wished to dispose of them as he was about to return to America, and to oblige him Mr. Harvey also bought the three puppies, and thus at the date when the plaintiff says he was bitten, Mr. Harvey had five "Great Danes." These dogs were left in the charge of one Deno, a sweeper, employed by Mr. Harvey to feed, tend and exercise them. It appears to be the essential portion of the sweeper's duties to exercise the dogs, though Mr. and Mrs. Harvey on certain occasions took them out alone.

On the 25th of January 1909, the sweeper about 4-30 P.M. took the five dogs to the Ballygunge maidan, and there some at any rate, if not all, the dogs attacked and bit the plaintiff very severely and the plaintiff therefore brings this suit.

The evidence of the plaintiff is that he and his bearer were going on to the maidan when they saw the sweeper seated on the ground having three dogs chained, the other two dogs being loose. The three that were chained were held by Deno who had placed his foot on the ends of the chains and was sitting down smoking. One of the dogs then ran towards the plaintiff who was very alarmed and ran to the other side of the bearer, and the dog followed and then the bearer took the child in his arms and covered him with his clothes and the whole five dogs then bit and scratched the plaintiff. On the other hand, the sweeper says that all five dogs were chained, and that when the plaintiff and his bearer were about twenty yards off, he

saw them and warned them not to come any nearer, and that they took no notice and continued to advance, and the child commenced to cry and two dogs becoming excited broke away and ran towards the plaintiff, and the bearer then concealed the child under his clothes and the dogs tore the clothes and bit the child.

There is one thing that is common to the evidence of each side and that is that the bearer covered the child with his clothes. It is not easy to understand why the bearer should have continued to advance if he was warned as the sweeper states. I have come to the conclusion that the story as told by the plaintiff and his bearer is the correct one. I think that the bearer displayed considerable courage in acting as he did.

This being so, the only question is as to whether the defendant had knowledge of the dogs' dispositions. Evidence on this point is given by one Grish Chandra Pal, a tutor, who says that the dogs had chased one of his boys from the Bishop Collegiate School and he had to call on the other boys to get ready to use their hockey sticks, but the evidence is not clear as to whether the dogs were savage or were merely playing. The statements of the defendant's sweeper have to be considered carefully. First of all, we have the fact that the sweeper told the bearer not to bring the child any nearer. How was the child in danger unless the dogs were likely to bite him. The evidence of the sweeper is that if the dogs were taken down a street and found a child crying and pulling its parent's clothes, by no means an unlikely occurrence, they would be likely to bite the child.

The defendant's sweeper had taken the dogs near a portion of the Ballygunge maidan, which is a recreation-ground for numerous children, and he must bear the consequences of what happened.

I think the judgment which has been cited to me in *Barnes v. Lucile, Ltd.* (1) applies only to cases where the person who has been bitten has done some act to provoke the dog. In this

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HARVEY.

FLETCHER J.

1909

PRAKASH
KUMAR
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v.

HARVEY.

FLETCHER J.

case the only act of provocation seems to be that the plaintiff cried on the Ballygunge maidan, and I think he was quite as justified in so doing as the defendant was in bringing five large dogs there.

Having taken this view, it is not necessary to consider the evidence of Oori *sais* who has stated that he was bitten by the dogs, though I must take exception to Mr. Stokes' statements that no reliance is to be put on the evidence of such men. In some cases I think even the evidence of *saises* may be true.

I think there is sufficient evidence to show that the dogs were likely to bite mankind without provocation.

There now remains the question of damages and the evidence of the plaintiff's father is that he has spent from Rs. 500 to Rs. 600 on medical attendance and travelling expenses. Mr. Stokes seemed at first inclined to challenge the fact as to whether it was proper to go at once to Kasauli. No one can have any doubt, but that in the circumstances the plaintiff was justified in going at once to Kasauli. Mr. Stokes, however, has abandoned this attitude. The plaintiff is, therefore, entitled to recover his expenses and those incurred by his father and mother, as having regard to his age they were necessary persons to proceed with him to Kasauli. The other question is as to the amount of general damages and there is very little evidence before me on the point. The plaintiff has not been as well as he was before the accident, but there is no evidence to show that this is the result of being bitten, and I think it will meet the case if I give the plaintiff a *solatium* of Rs. 400 for the pain and suffering he has undergone and a further sum of Rs. 600 to re-imburse his father, his costs and expenses of travelling and medical necessities. I, therefore, give judgment for the plaintiff for Rs. 1,000, together with costs on scale No. 2.

Judgment for plaintiff

S. C. R.

Attorneys for the plaintiff : *Leslie & Hinds.*

Attorneys for the defendant : *Orr, Dignam & Co.*

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bail; the only cases, which are dealt with under section 421 of the Code, being jail appeals. <i>RAMTOHAL DUSADH v. EMPEROR</i> (1909) I. L. R. 36 Calc.	385
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Attorney and Client—concl'd.

Court taxation of bills of solicitors is optional, and bills are often adjusted without such taxation. *Monohur Doss v. Romanauith Law*, I. L. R. 3 Calc. 473, distinguished. *Fifthly*, if parties to a promissory note agree that, on the debtor executing a bond in favour of a third person, the creditor would cancel the promissory note, the arrangement would be a perfectly valid contract although a promissory note is a negotiable instrument. *Lastly*, that where an order in precise terms orders accounts to be taken, it is a "decree." *Coverji Luddha v. Morarji Punja*, I. L. R. 9 Bom. 183, not followed. *Rahimbhoy Habibhoy v. Turner*, I. L. R. 15 Bom. 155; I. L. R. 18 I. A. 6, followed. *SHAMALDHONE DUTT v. LAKSHIMANI DEBI* (1908) I. L. R. 36 Calc. 493

—*Attorney's Retainer, how revocable—Civil Procedure Code (Act XIV of 1882) ss. 2, 39—Continuance of Authority of Attorney—Bill of Costs—Cause of Action, accrual of—Limitation.* An attorney's retainer cannot be revoked by his client by a mere letter: it can be revoked only with the leave of the Court by a writing signed by the client and filed in Court, as provided in s. 39 of the Code of Civil Procedure of 1882. In the case of an attorney's costs, the cause of action arises when the work for which he was retained is completed, and limitation begins to run from that time. *Coburn v. Colledge* [1897] 1 Q. B. 702, followed. Where the decree in the suit for which the attorney was retained, directed that the client should personally pay to other parties certain costs to be taxed:—*Held*, the attorney's authority continued after judgment and covered the taxation of these costs, and the retainer was not at an end until the issue of the *allocatur*. *Lady de la Pole v. Dick*, 29 Ch. D. 351, referred to. *ATUL CHUNDER GHOSE v. LAKSHMAN CHUNDER SEN* (1909) I. L. R. 36 Calc. . . 609

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Bail—Grounds for grant or refusal of—Remand to custody—Reasonable evidence of prisoner's guilt—Criminal Procedure Code (Act V of 1898) ss. 344, 497 and 498.—Held per Mitra J. (Coxe J. diss.) that the main question for consideration in determining matters of bail is whether there are reasonable grounds for believing the accused guilty of the offences charged. Other considerations must also arise in deciding this question, and one of these, which has always guided the English and Indian Courts, is whether there are any grounds for supposing that the accused would abscond. Under s. 497 of the Criminal Procedure Code an accused should ordinarily be released on substantial bail until reasonable grounds are made out for presuming his guilt. *In re Johur Mull*, 10 C. W. N. 1093, followed. If after a remand incriminating evidence is not adduced, and if the prosecution has already had sufficient time to adduce such evidence, the Court will reasonably conclude that such evidence is not forthcoming at the time. It should then under s. 497, sub-s. (2), release the accused on bail, whatever be the nature of the offence, though the preliminary enquiry should proceed. *Manikam Mudali v. Queen*, I. L. R. 6 Mad. 63, followed. Whether there are reasonable grounds or not must be decided judicially, that is to say, there should be some tangible evidence on the record on which, if un rebutted, the Court can conclude that the accused might be convicted. The statement by a witness that he has seen a certain act of an incriminating character done by the accused might be sufficient. But if there be no evidence whatsoever, or evidence of a very flimsy character on the face of it, the inference will be, after a reasonable time has elapsed since the beginning of the enquiry, that there are no reasonable grounds for supposing the

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accused to be guilty. The prosecution must, however, have a fair opportunity of adducing evidence of a really incriminating nature. At all events, the first information report should indicate with sufficient exactness, the character of the evidence likely to be forthcoming. The detention of an accused under trial is not intended to be penal, but its object is to secure attendance. The gravity of the offence and some evidence of its perpetration by the accused will, however, justify detention. *JAMINI MULLICK v. EMPEROR* (1908) I. L. R. 36 Calc. 174

—*Ground for granting or refusing—Remand to custody—Criminal Procedure Code (Act V of 1898) ss. 344, 497 and 498.*—In exercising its discretion under s. 498 of the Criminal Procedure Code the High Court should not confine its attention only to the question, whether the prisoner is likely to abscond or not. There may be other circumstances, which may also affect the question of granting bail to accused persons charged with crimes of a grave character. If a person is accused before a Magistrate of a non-bailable offence then, unless he considers that there are no reasonable grounds for believing him to be guilty, he must refuse bail, though he may be certain that the accused will stand his trial. It is the right of an accused to demand that the charges against him should be tried without any unreasonable delay, and such delay will dispose the High Court to grant bail. Where a police officer of superior rank deposed that he had evidence, which he believed, implicating the accused, and swore also to the truth of the first information, which alleged association of the accused in certain places and stated that the police had in their possession incriminating correspondence between the accused and a secret society in Calcutta, it was held that there was sufficient evidence for a remand under s. 344

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of the Code, but that there had been unreasonable delay as regards the prisoners, who had been in custody for about six weeks, though not in the case of those who were in jail for three weeks. *NARENDRA LAL KHAN v. EMPEROR* (1908) I. L. R. 36 Calc. 166

Bail-bond, forfeiture of—Bond for appearance before the Sessions Court—Production of the accused before such Court but not before the District Magistrate—Sureties, liability of—Bail-bond, terms of—Criminal Procedure Code (Act V of 1898) s. 514. A bail-bond providing only for the production of certain accused persons before the Sessions Court on a certain date is complied with by the appearance of the accused before such Court on such date, and the sureties are not bound to produce them subsequently before the District Magistrate. A bail-bond to produce the accused in the Sessions Court on every date fixed for the hearing of an appeal, or whenever required, is also complied with by the attendance of the accused during the hearing; and, though a requisition might be made by the Court of Session for their subsequent production in that Court, the sureties are not bound to produce them thereafter before the District Magistrate. A bail-bond should contain a clear proviso for the production of the accused before the Court or officer who is to take measures to secure their surrender and to re-commit them to jail in terms of the warrant. *General Rules and Circular Orders (Criminal) of the High Court, Chap. I, Rule 119*, referred to. *BEHARI LAL CHATTERJEE v. EMPEROR, RASH BEHARI SEN v. EMPEROR* (1909) I. L. R. 36 Calc. 749

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Bengal Tenancy Act (VIII of 1885) ss. 50, 106— <i>Presumption as to amount of rent—Permanent tenure.</i> The plaintiff's predecessors held a tenure from long before the Permanent Settlement at a rental of Rs. 4-8-0. In 1884 the tenure was split up into two tenancies bearing a rental of Rs. 2-4-0 each. In the Record of Rights of 1906 the tenure was described as not held at a fixed rent. The plaintiff brought a suit under s. 106 of the Bengal Tenancy Act claiming the tenure to be a permanent one, and the rent as fixed in perpetuity : <i>Held</i> , that the old tenure did not still exist in the shape of the two new tenancies, the land held by the tenure-holder being affected by the division, under cl. (3) of s. 50 of the Bengal Tenancy Act. <i>UDOY CHANDRA KARJI v. NEIPENDRA NARAYAN BHUP</i> (1909) I. L. R. 36 Calc ..	287	Bid under Misapprehension : See SALE	323
Bengal Tenancy Act (VIII of 1885) s. 85 : See SUPERIOR LANDLORD ..	256	Bill of Costs : See ATTORNEY AND CLIENT	609
Bengal Tenancy Act (VIII of 1885) ss. 106, 109A : See APPEAL ..	510	Bill of Exchange— <i>Return of bill by indorsee to drawer—Re-indorsement, whether necessary—Drawer's right of action against acceptor.</i> A bill of exchange drawn by J. & Co. to their order was accepted by S. and was endorsed by J. & Co. to C. who discounted the bill. The bill was presented at maturity and was dishonoured, whereupon C. debited J. & Co.'s account with the amount of the bill, and returned the bill to them, but without re-indorsement. On an action by J. & Co. against S. on the bill. <i>Held</i> , that the drawers had the right to sue the acceptor on the bill, by virtue of being a party to the bill and as suing on the contract contained in the bill between themselves and the acceptor. <i>JAMESON & Co. v. SCOTT</i> (1908) I. L. R. 36 Calc.	274
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Bengal Tenancy Act (VIII of 1885) s. 170— <i>Decree for arrears of rent due on two holdings—Claim, whether maintainable—Civil Procedure Code (Act XIV of 1882) s. 278.</i> Section 170 of the Bengal Tenancy Act (VIII of 1885) does not apply to a decree obtained by a co-sharer landlord for his share of rent in respect of two holdings; and that, therefore, when the holdings are attached in execution of such a decree, a claim under s. 278 of the Code of Civil Procedure is main-		Bona fide Purchaser : See HINDU LAW —ENDOWMENT	1003
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		Bond, forfeiture of : See SURETY BOND	562
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Burmese Law—Adoption—Evidence of adoption—Adult niece claiming to be adopted daughter of childless uncle, and entitled to his estate—Proof of publicity of relationship and notoriety essential—Inferences from past statements and conduct.		Burmese Law—concl'd.	
According to the law of Burma, by which no formal ceremony is necessary to constitute adoption, the fact of adoption can either be proved as having taken place on a distinct and specified occasion, or may be inferred from a course of conduct which is inconsistent with any other supposition. But in either case publicity must be given to the relationship, and the amount of proof of publicity required will be greater in cases of the latter category when no distinct occasion can be appealed to. In the case of a child leaving its natural parents and being brought up in the house of another person who treats it as a father would a child, the inference of the relationship existing, and the publicity of the relationship may naturally be drawn from the facts of the lives of the parties, apart from their verbal statements. But in the case of an adult adoption where the inferences to be drawn from "bringing up" are necessarily absent, it is especially requisite to insist on adequate proof. In this case an orphan adult niece claimed the estate of a childless uncle, with whom it was only natural she should live, on the ground that she had been taken by him as his adopted daughter when she was over 30 years of age, the evidence of the publicity of the relationship alleged depending upon the testimony of the claimant herself, and the statements of the deceased uncle spoken to by witnesses, and the consequence of upholding the adoption being the disinheritance of those entitled to succeed :— <i>Heid</i> , that the evidence was not sufficient to establish the adoption. Where parties might have precluded the raising of subsequent questions by means of an actual, though not ceremonial, adoption in the presence of witnesses, and they had		not done so, but had left the fact of adoption to be inferred from past statements and conduct, adequate proof of publicity and notoriety of the relationship should be insisted on. <i>MA YWET v. MA ME</i> (1909) I. L. R. 36 Calc.	978
		Calcutta Corporation—Mandamus, action for—Calcutta Municipal Act (Bengal III of 1899) ss. 9, 14, 95, 371, 375, 377—Corporation, rights of—Permission to erect Masonry Building—Specific Relief Act (I of 1877) s. 45.	
		There is no provision under the Calcutta Municipal Act, either express or implied, which gives the Calcutta Corporation any control over the General Committee in matters specifically delegated by the Act to the General Committee. The Chairman has the right to reject or approve any plan submitted, and an appeal may be made to the General Committee whose decision is final. The Corporation has no jurisdiction to approve or reject any plan. No action in the nature of a mandamus lies against the Corporation to compel them to approve any plan for making additions or alterations to buildings. The plaintiff's remedy in such a case is against the General Committee or Chairman under s. 45 of the Specific Relief Act. <i>BHOLARAM CHOWDHRY v. THE CORPORATION OF CALCUTTA</i> (1909) I. L. R. 36 Calc.	671
		Calcutta Municipal Act (Beng. III of 1899) ss. 9, 14, 95, 371, 375, 377 : See CALCUTTA CORPORATION	671
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		Charge—Jury—Heads of charge—Contents of, and time of recording heads of charge—Misdirection of Jury—Omission to read whole of the depositions of witnesses—Omission	

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to direct Jury to draw a "presumption" against the prosecution, when certain witnesses were not called—*Direction in rioting cases—Oral proof of statements by witnesses to the police—Criminal Procedure Code (Act V of 1898) ss. 162, 297, and 367—Circular Orders of the High Court, Chap. I, Order 59—Evidence Act (I of 1872) s. 114, Ill. (g) and s. 157—Indian Penal Code (Act XLV of 1860) ss. 141 and 302.* It is not necessary that the heads of charge to the Jury should be reduced to writing before delivery of the charge, but they ought to be written as soon as possible thereafter and when the facts are fresh in the Judge's mind. The heads of charge should represent with absolute accuracy the substance of the charge, and be such as to enable the High Court on appeal to see distinctly, whether the case was fairly and properly placed before the Jury. *Circular Orders of the High Court, Chap. I, Order 59*, referred to. It is not incumbent on the Judge to read the whole of the depositions of the witnesses to the Jury. It is enough that references have been made to them so as to sufficiently attract their attention to them. It is not necessary that the Judge should direct the Jury, in so many words, that the omission of the prosecution to call certain witnesses raised a "presumption" under the Evidence Act (I of 1872) s. 114, Ill. (g), that their evidence would be unfavourable to the Crown, if he has pointed out that the Jury might properly draw any inference they pleased from such omission. Section 141 of the Penal Code is sufficiently explained to the Jury, if the Judge has told them that, if five persons go in a body with the common object of murdering a man, and if he is killed in the prosecution of the common object, then, no matter who struck the fatal blow, all are equally guilty of murder under ss. 302 of the Penal Code. Section 162 of the present Criminal Procedure Code prohibits the use of the record of the statement of a witness

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taken under s. 161 as evidence, but does not override the general provisions of the Evidence Act as to proof of such statement by oral evidence, and such statement is admissible under s. 157 of the Act in corroboration of the evidence of the witness given at the trial. The proviso to s. 162 of the present Code is confined to, and is for the benefit of, the accused. *Queen-Empress v. Bhairab Chunder Chuckerbutty*, 2 C. W. N. 702, distinguished. *Emperor v. Narayan Raghunath Patki*, I. L. R. 32 Bom. 111 per Beaman J., dissented from. *Reg. v. Uttamchand Kapurchand*, 11 Bom. H. C. 120, and *Empress v. Kali Churn Chumari*, I. L. R. 8 Cal. 154, referred to. *FANINDRA NATH BANERJEE v. EMPEROR* (1908) I. L. R. 36 Cal. ...

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Cheating—Evidence—Obtaining by false representation money as pretended security for appointment to office—Admissibility of proof of previous and subsequent similar but unconnected transactions as evidence of dishonest intention on the occasion in question—Part of a systematic series of similar fraudulent transactions—Evidence Act (I of 1872) ss. 11, Expl. (1), Illus. (o); 15, Illus. (a). On a charge against the accused of cheating by falsely representing that he was the *deewan* of an estate and could procure for the complainant appointment to the vacant post of manager to the estate, and thereby obtaining a sum of money as a pretended security deposit, evidence of instances of similar but unconnected transactions with other persons, before and after the date of the offence charged, is admissible under ss. 14 and 15 of the Evidence Act, not to establish the *factum* of the offence but to prove that the transaction in issue was one of a systematic series of frauds, and that the intention of

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the accused on the particular occasion in question was dishonest and fraudulent. Explanation (1) and Illus. (c) to s. 14 of the Evidence Act render facts showing the existence of a state of mind relevant only if they establish that such state of mind existed in reference to the particular matter in issue. Section 15 is an application of the general rule laid down in s. 14, and the words of the section as well as of Illus. (a) show that it is not necessary that all the acts should form parts of one transaction, but that they should be parts of a series of similar occurrences. <i>Reg. v. Holt</i> , Bell C. C. 280, discussed and distinguished. <i>Queen v. Francis</i> , L. R. 2 C. C. R. 128, <i>Reg. v. Rhodes</i> [1899] 1 Q. B. 77, <i>Reg. v. Ollis</i> [1900] 2 Q. B. 758, <i>Rex v. Wyatt</i> [1904] 1 K. B. 188, <i>Rex v. Bond</i> [1906] 2 K. B. 389, <i>Makin v. Att.-Gen. for New South Wales</i> [1894] A. C. 57, and <i>Queen-Empress v. Vajiram</i> , I. L. R. 16 Bom. 414, followed. <i>EMPEROR v. DEBENDRA PROSAD</i> (1909) I. L. R. 36 Calc. 573	
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— ss. 244, 311 : See SALE	336
— ss. 244, 295, 622—Rateable distribution—Different judgment-debtors—Appeal against order under s. 295, if lies—Jurisdiction of High Court to interfere under s. 622.—An order under s. 295 of the Civil Procedure Code passed as between parties who are not the same as in the decree in execution of which assets were realized under s. 295, is not a decree under s. 244, and no appeal lies against the order, and the order of the District Judge on appeal, setting aside the order of the Munsif, is	

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Civil Procedure Code (Act XIV of 1882)—contd.		Civil Procedure Code (Act XIV of 1882)—concl'd.	
without jurisdiction. <i>Held, further</i> , that when an order is wholly without jurisdiction, the High Court should interfere under s. 622. — <i>Gonesh Das Bagria v. Shiva Lakshman Bhakat</i> , I. L. R. 30 Calc. 583, not applicable. <i>Ramasamy Chettiar v. Orr</i> , I. L. R. 26 Mad. 176, followed. <i>Dayaram Jaggivan v. Govardhandas Dayaram</i> , I. L. R. 28 Bom. 458, distinguished. <i>Prosunno Kumar Sanyal v. Kalidas Sanyal</i> , I. L. R. 19 Calc. 683; L. R. 19 I. A. 166, referred to. <i>JAGADISH CHANDRA SHAHA v. KRIPA NATH SHAHA</i> (1908) I. L. R. 36 Calc. 130		— ss. 558, 560 : See APPEAL .. 510	
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— s. 492— <i>Execution of decree—Application to a Civil Court for stay of sale in execution of a decree of a Revenue Court.</i> The Revenue Courts are Courts of Civil Judicature within the meaning of the Civil Procedure Code, in that their decrees when transferred in the regular Courts are to be treated in all respects as if they were passed by a Court of Civil Judicature. <i>Held</i> , therefore, that an application under s. 492 of the Code of Civil Procedure for stay of sale in execution of a decree of a Revenue Court in a suit under s. 93 of Act XII of 1881, can be entertained by a Civil Court. <i>Onkar Singh v. Bhup Singh</i> , I. L. R. 16 All. 496, dissented from. <i>RAM LOCHAN SINGH v. BENI PRASAD KUMRI</i> (1908) I. L. R. 36 Calc. .. 252		Codified Law : See CONTRACT 354	
— ss. 503 cl. (b), 588 cl. (24) : See RECEIVER 713		Collector, partition by : See PARTITION 726	
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		Commission—Practice—Evidence taken on commission, when evidence in suit—Practice on the Original Side of the High Court and the Mofussil Courts—When Court may grant time and adjourn Hearing—Costs of Adjournment—Civil Procedure Code (Act XIV of 1882) ss. 156, 389, 390. Where a commission was duly executed and returned together with the evidence taken under it to the Court which issued it and formed part of the record of the case under s. 389 of the Civil Procedure Code (Act XIV of 1882), and where the circumstances mentioned in s. 390 of the Code, which would exclude the deposition from being read as evidence in the suit, do not exist :—<i>Held</i>, that regard being had to the practice of the mofussil Courts, which is not only perfectly consistent but also in strict accordance with the provisions of the Civil Procedure Code, it is not necessary to tender the evidence taken on commission formally at a trial, to make it evidence in the case. <i>Man Gobindo Chowdhury v. Shashindra Chandra Chowdhury</i>, I. L. R. 35 Calc. 28, followed. <i>Dwarka Nath Dutt v. Gunga Dayi</i>, 8 B. L. R. App. 102, <i>Nistarini Dassee v. Nundo Lal Bose</i>, I. L. R. 26 Calc. 591, <i>Kusum Kumari Roy v. Satya Ranjan Das</i>, I. L. R. 30 Calc. 999, and <i>Struthers v. Wheeler</i>, 6 C. L. R. 109, referred	

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to. Where the Court made an order for adjournment conditional upon the immediate payment of costs :— <i>Held</i> , that although s. 156 of the Civil Procedure Code (Act XIV of 1882) gives the Court ample discretion as to the particular directions to be given in the matter of costs, an order ought not to be made conditional upon immediate payment of costs, without sufficient opportunity being given to the plaintiff to enable him to carry out the orders of the Court and to produce his evidence. <i>DHANU RAM MAHTO v. MURLI MAHTO</i> (1909) I. L. R. 36 Calc.	566
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Commitment— <i>Right of the accused to cross-examine the prosecution witnesses, and to produce defence evidence before commitment—Power of Magistrate to commit at any stage of the case—Jurisdiction of the High Court, as a Court of Revision, to quash a commitment made to it in its Original Criminal Jurisdiction—Criminal Procedure Code (Act V of 1898) ss. 208, 215 and 347. Section 347 of the Criminal Procedure Code cannot be read as subject to s. 208 so as to render it imperative on a Magistrate, after he has decided to commit the case to the Sessions, to allow the accused to cross-examine the prosecution witnesses and to call witnesses in his defence. Where, therefore, the accused did not cross-examine the prosecution witnesses immediately after their examination-in-chief, but applied to the Magistrate, after the close of the prosecution, to cross-examine them and to examine defence witnesses :—Held</i> , that the Magistrate was justified under s. 347 in committing the case without the cross-examination of the prosecution witnesses and the examination of the witnesses for the defence. <i>In re Clive Durant, Ratanlal's</i> unreported Cr. Ca. p. 975, followed. <i>Queen-Empress v. Ahmad</i> , I. L. R. 20 All. 264, <i>Emperor v. Muhammad Hadi</i> , I. L. R. 26 All. 177, dissented from,	

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<i>Queen-Empress v. Sagal Samba Sajan</i> , I. L. R. 21 Calc. 642, distinguished. <i>Quere</i> : Whether the High Court, in its Appellate and Revisional Jurisdiction, has power to quash a commitment made to the Court in its Original Criminal Jurisdiction. <i>PRANINDRA NATH MITRA v. EMPEROR</i> (1908) I. L. R. 36 Calc.	48
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Common Object different from that in charge : <i>See</i> RIOTING	865
Compensation— <i>Land Acquisition Act (I of 1894)—Amount of Compensation payable for land on left bank of river Hooghly near Calcutta required for purposes of the Port Commissioners of Calcutta—Judgment in former land acquisition case regarding land in the vicinity, and amount awarded therefor—Review by High Court of valuation by Special Judge. In this case which related to the amount of compensation payable to the owners of certain land on the left bank of the river Hooghly near Calcutta, which had been acquired by the Government of Bengal under Act I of 1894 for the purposes of the Port Commissioners of Calcutta, the High Court did not agree with the scheme of valuation made by the Special Judge, and had increased his award relying upon the prices paid for a piece of land in the vicinity in previous land acquisition proceedings as affording a guide to the amount of compensation to be awarded in the present case. And on appeal by the Government, it was contended that in doing so the High Court had wrongly disregarded the great experience of the Special Judge and had given undue weight as evidence to the decision in the former case, in which it was said that the land was so essentially different in area, locality, and special and peculiar advantages, that no deduction could be drawn from the amount awarded for it which would be of any use in estimating the value of the land now in dispute. Their Lordships</i>	

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of the Judicial Committee holding that no good ground for such a contention had been established, dismissed the appeal. SECRETARY OF STATE FOR INDIA v. INDIA GENERAL STEAM NAVIGATION AND RAILWAY COMPANY, LD. (1909) I. L. R. 36 Calc.	967	Magistrate has refused to order a further inquiry in the matter on application made to him for that purpose. JYOTINDRA NATH DAW v. HEM CHANDRA DAW (1908) I. L. R. 36 Calc.	415
Compensation, suit for : See LIMITATION	141	Complaint, petition of : See DYING DECLARATION	659
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Complaint—Magistrate—Complaint to Magistrate in charge of the sadar—Reference of complaint to another Magistrate for inquiry and report—Jurisdiction of latter to direct prosecution of the complainant before dismissal of the complaint—"Judicial proceedings"—Criminal Procedure Code (Act V of 1898) ss. 4 (m) and 476. Where a complaint was lodged before the Senior Deputy Magistrate in charge of the sadar, who referred it to a Junior Deputy Magistrate "for inquiry and report," and the latter, after taking evidence, drew up a proceeding under s. 476 against the complainant, and submitted a report to the former Magistrate, upon which he dismissed the complaint the next day :— <i>Held</i> , that the proceeding before the Junior Deputy Magistrate was a "judicial proceeding" within s. 4 (m), and that he had jurisdiction under s. 476 of the Criminal Procedure Code to direct the prosecution of the complainant for an offence under s. 211 of the Penal Code committed before him. KANCHAN GORHI v. RAM KISHUN MUNDUL (1908) I. L. R. 36 Calc.	72	Conspiracy—Auction-sale—Fraud—Combination among bidders not to bid against each other—Cause of action—Fraud, allegations of, to be specifically pleaded. A combination among bidders at an auction not to bid against each other, even if the combination amounts to a "knock-out," does not give rise to an action at the suit of the vendor. <i>Ambica Prosad Singh v. R. H. Whitwell</i> , 6 C. L. J. 111, <i>Fuller v. Abrahams</i> , 3 Brod. & B. 116, <i>Levi v. Levi</i> , 6 Car. & P. 239, dissented from. <i>Doolubdass v. Ramlall</i> , 15 Jur. 257, referred to. Allegations of fraud must be specifically pleaded: general allegations, however strong, are insufficient to amount to an averment of fraud of which any Court ought to take notice. <i>Wallingford v. Mutual Society</i> , L. R. 5 A. C. 685, and <i>Ganga Narain Gupta v. Tiluckram Choudhry</i> , I. L. R. 15 Calc. 533, followed. JYOTI PROKASH NANDI v. JHOWMULL JOHERRY (1908) I. L. R. 36 Calc.	134
		Construction of Will : See WILL, VALIDITY OF	149
		Contract—Injunction—Breach of contract—Contract of personal service—Agreement—Absence of negative agreement—Negative covenant implied—Specific Relief Act (I of 1877) s. 57, also illustration (d)—Restraint of trade—Damages—Contract Act (IX of 1872) s. 74—Codified law. By an agreement made in England, M. was engaged by B. & Co., a firm of Engineers in Calcutta, as an assistant in their firm for a period of five years, and it was, <i>inter alia</i> ,	
Dismissal of complaints by Subordinate Magistrate—Refusal by District Magistrate to order further inquiry—Revival of complaint after such refusal—Criminal Procedure Code (Act V of 1898) ss. 203 and 437. A Subordinate Magistrate, who has dismissed a complaint under s. 203 of the Code, is competent to revive it notwithstanding that the District			

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agreed that "he should diligently and to the best of his ability devote himself to the duties incumbent on him and should faithfully observe and comply with such instructions as he might from time to time receive from the firm." During the term of his engagement, M. left the employ of B. & Co. and entered that of another firm. On a suit, instituted by B. & Co., for an injunction to restrain M. from serving, working or being employed by any other person or persons and for damages:—*Held*, although there was no negative condition in terms in the agreement, a negative covenant could be properly implied, under s. 57 of the Specific Relief Act, and illustration (d) thereto, which gave legislative sanction in India to the law as laid down by Selborne L. J. in *Wolverhampton and Walsall Railway Company v. London and North-Western Railway Co.*, L. R. 16 Eq. 433, *Charlesworth v. MacDonald*, 1 L. R. 23 Bom. 103, *Lumley v. Wagner*, 5 DeG. & S. 485, *Whitehead Chemical Company v. Hardman* [1891] 2 Ch. 416, *Ehrman v. Bartholomew* [1898] 1 Ch. 671, referred to. Where the law has been codified, it is of little avail to enquire what is the law apart from such codification: the Code itself must be looked to as the guide in the matter. As the contract had been most deliberately broken the plaintiffs were entitled to an injunction according to the principles of equity, justice, and good conscience. *Burn & Co. v. McDonald* (1908) L. L. R. 36 Cal. 354

—*Sale of Goods by Description—Appropriation by Vendor—Refusal to take Delivery—Reference to Arbitration—Evidence of Assent—Action for Goods bargained and sold—Suit for Price—Contract Act (IX of 1872) s. 120.* Where in a contract for the sale of goods by description the property in the goods has passed to the buyer, s. 120 of the Indian Contract Act does not deprive the seller of

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the form of action for goods bargained and sold, and such an action can be brought for the price of the goods on the buyer refusing to take delivery. *Mitchell, Reid & Co. v. Buldeo Doss Khettry*, I. L. R. 15 Cal. 1, distinguished. A letter of reference signed by both buyer and seller, requesting arbitrators to ascertain whether certain specific bales of goods, appropriated by the seller to the contract, are inferior in quality to the goods deliverable under the contract, and whether an allowance ought to be made, is evidence of assent by the buyer to the appropriation. *FINLAY, MUIR & Co. v. RADHAKISSEN GOPIKISSEN* (1909) I. L. R. 36 Cal. 736

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Magistrate initiated proceedings under s. 145 on a police report on which he was satisfied that there was an apprehension of a breach of the peace, and there was evidence on the record of a probability of such breach of the peace, the High Court refused to set aside the final order as without jurisdiction. *KISHORI LAL ROY v SRINATH ROY (1908) I. L. R. 36 Calc.* 370

— s. 147—*Use of Water, dispute relating to—Erection of Bund by one party—Order by Magistrate for its removal under police supervision—Injunction by Civil Court restraining the opposite party from interfering with the Bund—Subsequent order by Magistrate directing its removal by the Police.* Section 147 of the Criminal Procedure Code contemplates orders directed to the parties to the dispute, and does not enable a Magistrate to enforce his orders, passed thereunder, through the agency of the police. An order passed some time after the termination of the proceedings under s. 147 of the Code, directing the removal of a bund by the police, is without jurisdiction. *Pasupati Nath Bose v. Nando Lal Bose*, 5 C. W. N. 67, and *Lalit Chandra Neogi v. Tarini Persad Gupta*, 5 C. W. N. 335, distinguished. *DALMIER PURI v. KHODAD KHAN (1909) I. L. R. 36 Calc.* 923

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land :— <i>Held</i> , that the contract constituted a set of distinct contracts, and the proper measure of damages was the sum of the differences between the contract and market price of the several quantities at the several periods for delivery, even though the defendant repudiated the contract at a period previous to the final date specified in the contract. <i>Josling v. Irvine</i> , 6 H. & N. 512, <i>Brown v. Muller</i> , L. R. 7 Ex. 319, <i>Roper v. Johnson</i> , L. R. 8 C. P. 167, followed. Inasmuch as there was no market rate for the commodity in Calcutta at the date of the breaches, the damage for those breaches was the value to the plaintiffs of the portions that ought to have been delivered on those dates at the prices procurable in England less the cost of getting them there. <i>Borries v. Hutchinson</i> , 18 C. B. N. S. 445, followed. <i>COOVERJEE BHOJA v. RAJENDRA NATH MUKERJEE</i> (1909) L. R. 36 Calc. 617		the eminence, but in the direct line of fire. The road was not visible from the firing point, but clearly so from the target. A bullet struck a man passing along the road at a spot in the line of fire, though it did not appear, who had fired the shot. No precautions of any kind were taken to prevent danger to passers-by on the road from such firing. <i>Held</i> , that they were both guilty of criminal rashness and negligence within section 304A read by itself without reference to ss. 34 and 107, in firing at an object on the sky-line of the eminence, against the light (which was in itself dangerous), near a public road within the zone of fire with a rifle which, sighted to a 100 yards, they must have known might easily carry some considerable distance beyond and prove fatal, without taking any precautions or using the slightest circumspection with reference to the safety of others. The words "rash or negligent act" in s. 304A of the Penal Code have the same meaning as "does any act so rashly or negligently" in ss. 336, 337 and 338. Section 336 renders criminal the doing of any act so rashly or negligently as to endanger human life or the safety of others, irrespective of the consequences. Sections 337 and 338 only impose a greater punishment when hurt or grievous hurt is the result of such rashness or negligence. Section 304A provides for the case of death by such rash or negligent act under circumstances not amounting to culpable homicide. <i>Reg. v. Salmon</i> , L. R. 6 Q. B. D. 79, and <i>Reg. v. Nidamarti Nagabhushanam</i> , 7 Mad. H. C. 119. Section 545 (1) (b) provides for compensation, in cases where it is recoverable under Act XIII of 1855, to the persons therein indicated, <i>viz.</i> , "the wife, husband, parent and child, if any," of the deceased. <i>Yalla Ganpathu v. Mamidi Dali</i> , I. L. R. 21 Mad. 74, dissented from. <i>EMERSON v. MORGAN</i> (1909) L. R. 36 Calc. 302	
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adultery with the co-respondent.
Subsequently an agreement was
come to between the petitioner
and the respondent, by which,
for a pecuniary consideration,
the respondent agreed not to de-
fend the suit and to furnish the
petitioner with evidence against
herself and the co-respondent,
should the latter venture to defend
the suit. This agreement, how-
ever, fell through, and the re-
spondent filed her answer denying
adultery, and making a counter-
charge of adultery against the
petitioner. The co-respondent did
not defend the suit. At the
trial, the plea taken by the re-
spondent was that the petition
should be dismissed on the ground
of collusion between the peti-
tioner and herself:—*Held*, that
inasmuch as the agreement,
which contemplated a fraud upon
the Court, was not acted on, and
in no way affected the decision of
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Code (Act XLV of 1860) ss. 34, 326. A petition of complaint and the examination of the complainant on oath under s. 200 of the Criminal Procedure Code are admissible as dying declarations under s. 32, cl. (1), of the Evidence Act, and are not, as such, matters required by law to be reduced to the form of a document within s. 91 of the Evidence Act so as to exclude parole evidence of their terms. The statements admissible in evidence, when made in the absence of the accused, is the oral statement of the deceased, and not the record of it; and such oral statement must be proved by the person who recorded it or heard it made. *Empress v. Samiruddin*, I. L. R. 8. Cal. 211, and *King-Emperor v. Mathura Thakur*, 6 C. W. N. 72, followed. Where several accused persons struck the deceased several blows, one of which only was fatal, and it was not found who struck the fatal blow, it was held that, in the circumstances, it could not be said that those who did not strike the fatal blow contemplated the likelihood of such a blow being struck by the others in prosecution of the common object, and that they were all guilty under s. 326, and not under s. 302, of the Penal Code. *GOURIDAS NAMASUDRA v. EMPEROR* (1908) I. L. R. 36 Cal. 659

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High Court, jurisdiction of—Power to revise orders of discharge by Presidency Magistrates, and to direct further inquiry—Criminal Procedure Code (Act V of 1898) ss. 423, 439—Charter Act (24 and 25 Vic., c. 104) s. 15. The High Court has power under s. 439 read with s. 423 of the Criminal Procedure Code, to revise an order of discharge passed by a Presidency Magistrate and to direct a further inquiry, if there are good reasons for doing so, although no question of jurisdiction arises in the case. <i>Hari Dass Sanyal v. Saritulla</i>, I. L. R. 15 Calc. 608, <i>Colville v. Kristo Kishore Bose</i>, I. L. R. 26 Calc. 746, <i>Dwarka Nath Mondul v. Beni Madhab Banerjee</i>, I. L. R. 28 Calc. 652, and <i>Emperor v. Varjivandas</i>, I. L. R. 27 Bom. 84, followed. <i>Bellew v. Parker</i>, 7 C. W. N. 521, referred to. <i>Charobala Dabee v. Barendra Nath Mozumdar</i>, I. L. R. 27 Calc. 126, <i>Kedar Nath Sanyal v. Khetra Nath Sikdar</i>, 6 C. L. J. 705, and <i>Debi Bux Shroff v. Jutmal Dugarwal</i>, I. L. R. 33 Calc. 1282, discussed and dissented from. The High Court cannot interfere, under s. 15 of the Charter Act, with the order of a subordinate Court on the ground of an error in law, but only for an error affecting jurisdiction, that is, either a want or refusal of jurisdiction or an illegality in the exercise of it. <i>Tejram v. Har-sukh</i>, I. L. R. 1 All. 10, and <i>Corporation of Calcutta v. Bhupati Roy Chowdhry</i>, I. L. R. 26 Calc. 74, referred to. Where on the admission of the accused an offence of criminal misappropria-	

High Court, jurisdiction of—concl'd.

tion might have been established, and the Magistrate did not consider or elicit matters of vital importance in the case:—*Held*, that there had been no proper inquiry into the charge and that there were *prima facie* grounds for directing a further inquiry. *Ram Logan Dhobi v. Inglis*, unreported, and *Hari Moodi v. Kumode*, unreported, distinguished. *MALIK PRATAP SINGH v. KHAN MAHOMED* (1909) I. L. R. 36 Calc.

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High Court Rules (Appellate Side), Part II, Ch. IV, Rule XX: See PRIVY COUNCIL APPEAL

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Hindu Law—Adoption—Evidence of Adoption—Adoption of Daughter's Son, validity of—Question not raised until too late a stage of the hearing—Estoppel by assent of Reversioner to Alienations by Widow—Power of Reversion to bind later Reversioners—Reversioners claiming not through preceding Reversioner but through last male owner—Misjoinder of Causes of Action—Civil Procedure Code (XIV of 1882) s. 578. The appellant's right to maintain a suit to set aside alienations of certain immoveable property made by the widow and the natural mother of the last male owner, who was the daughter's son of the original owner, depended on whether, as the appellants alleged, he was also his adopted son. On this question the Courts in India differed:—*Held*, by the Judicial Committee, that on the evidence the adoption was established. It showed that, on the death of the original owner, the alleged adopted son succeeded to the estate without controversy which he could only have done as adopted son, and enjoyed it and disposed of it as his own, also without controversy, down to his death in 1870: almost every document both during his life and after his death was framed entirely on the basis of the adoption. An objection to the validity of the adoption on the ground that under the Hindu

Hindu Law—cont'd.

law a daughter's son could not be adopted, was only put forward for the first time at the very last stage of the hearing, after all the evidence was closed and nothing but argument remained. The decision depended on whether the rule of Hindu law had been varied by family custom:—*Held*, that the District Judge was right in refusing to entertain at that late stage of the case a new question of that kind the solution of which must be dependent upon evidence. The main defence to the suit was that the assent of the appellants' father to the transactions in dispute, not only estopped him from contesting the validity of the alienations, but created an estoppel binding his sons, the appellants. As showing this a document dated 3rd September 1871 was produced which, after reciting that except his mother there was no heir to or claimant of the adopted son's property, stated that the widow agreed that during the mother's lifetime she should remain in possession of a half share of the property, and that after the death of the mother and the widow both the shares should devolve by inheritance on the sons of the mother, who were the natural brothers of the adopted son. This deed was signed by the father of the appellants who at that time was the only reversioner. The Courts in India differed as to the effect of his concurrence in the deed:—*Held*, that the division of her life-interest with the mother was an act which did not need the assent of the appellants' father; and to provide for the descent of the inheritance after her death in a line different from that prescribed by law was a thing which the widow could not do either with or without his assent. There was, therefore, no estoppel on the reversioner, and consequently none on his sons. Another document relied on by the respondents was one of the alienations sought to be set aside. It was executed by the two

Hindu Law—*contd.*

ladies on 1st July 1888, and recited that they inherited the property in question from the original owner by virtue of right of succession and also by reason of the relinquishment of their rights by all the original owner's collateral heirs. They referred to the deed of 3rd September 1871 and stated that they, the executants, were absolute owners by exercising proprietary rights. They conveyed the land to the purchasers absolutely, and finally stipulated that neither they nor their heirs or descendants would ever raise any objection, nor would the original owner's collateral heirs whose rights, if any, "had been extinguished by their putting their signature to this deed, and admitting it to be correct." This deed was also attested by, amongst others, the father of the appellants. The Courts in India again differed:—*Held*, that the deed only bound the ladies and the collateral heirs of the original owner from whom they claimed to have derived title. It did not affect any title coming from the adopted son through whom the appellants claimed; they were, therefore, not estopped. The ladies, the alienees, of the four separate alienations sought to be set aside, and the natural brothers of the adopted son were all made defendants in the present suit:—*Held*, that it was very doubtful whether, on the strictest construction to be placed on the Civil Procedure Code, it could properly be said there was any misjoinder of causes of action: but even if there was, s. 578 of the Code had the effect of preventing such a defect from being made a ground of appeal on which the decree of the first Court could be reversed. The decree of the Chief Court was reversed, and that of the District Judge restored. *LALA RUP NARAIN v. GOPAL DEVI* (1909) I. L. R. 36 Calc.

—*Adoption by Hindu Woman—Prostitute, adoption by—Inheritance, right of—Letters of Administration.* A Hindu woman cannot under any circumstances adopt

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a son to herself, nor can any so-called adoption confer a right of inheritance on the adopted son. *NARENDRA NATH BAIRAGI v. DINA NATH DAS* (1909) I. L. R. 36 Calc.

—*Alienation—Legal Necessity—Hindu Daughter's right to alienate property—Onus of Proof—Sradh Ceremony—Government Revenue—Succession Certificate, costs of—Property sold for Arrears of Road-cess, recovery of.* A Hindu widow died leaving her surviving a daughter as life-tenant to the estate of her deceased husband which was in involved circumstances. The daughter executed a *kobala* and a mortgage of the properties, and out of the moneys thereby obtained she paid for the *sradh* ceremony of her mother, the Government revenue, the costs of a succession certificate and a rent-decree. She also executed another mortgage and used the money obtained to recover the property sold for arrears of road-cess. In a suit brought by the reversionary heir after the death of the life-tenant to set aside the *kobala* and the mortgages as having been made by the life-tenant in excess of her power of alienation:—*Held*, that it was for the defendant to show that these alienations had been made for legal necessity. *Held*, further, that the expenses of the *sradh* ceremony, the payment of the Government revenue, the costs of the succession certificate and the payment of the rent-decree were made for legal necessity; but that the payment of money to recover the property sold for arrears of road-cess was not so made. *Raj Chandra Deb Biswas v. Sheeshoo Ram Deb*, 7 W. R. 146, *Shekaat Hosain v. Sasi Kar*, I. L. R. 19 Calc. 783, *Mahanund Chuckerbutty v. Banimadhub Chatterjee*, I. L. R. 24 Calc. 27, *Rupram Namasudra v. Iswar Namasudra*, 6 C. W. N. 302, approved. *Braja Lal Sen v. Jiban Krishna Roy*, I. L. R. 26 Calc. 285, distinguished. *SRIMOHAN JHA v. BRIJBEHARY MISSEER* (1909) I. L. R. 36 Calc.

Hindu Law—contd.

Custom—Primogeniture, rule of—Orissa and Cuttack, Land Tenure in—"Paharaj"—"Chowdhuri"—Hereditary office, land attached to—Regulation XI of 1793—Regulation XII of 1805, s. 36—Regulation X of 1800—Statements of deceased persons—Evidence Act (I of 1872) ss. 21 and 32, cl. (5)—Proof of Custom. The appellants and respondents were members of a Brahmin family long established and possessed of an estate in Cuttack. To a suit by the appellants for partition of the estate on the ground that it was joint family property governed by the ordinary Hindu law of the Mitakshara School, the defence was that a custom of lineal primogeniture prevailed in the family by which from a period prior to British rule the estate had always descended to the eldest son, the junior members of the family being entitled only to maintenance, and not to any share of the land. The only reliable evidence of the status of the family during the period of native rule consisted of documents of ancient date which showed that the office of Chowdhuri had been held in succession for many generations by a member of the family, and that to the holder of that office certain lands called "nankar" were assigned as part of his remuneration. The Subordinate Judge decreed the suit holding on the evidence that the custom was not proved, but the High Court reversed that decision being of opinion that the evidence was sufficient to establish the custom:—*Held* by the Judicial Committee reversing the decision of the High Court, that the evidence fell far short of establishing the custom during the period of native rule. From the documents produced, it appeared that the grant of the office of Chowdhuri was one of an office only; that the office was revocable at the pleasure of the sovereign, and though generally heritable it might be conferred by him not merely on the eldest son

Hindu Law—contd.

but upon any member of the family, or indeed upon any body. These considerations, though they might suggest a presumption, were not sufficient to establish a right, for which purpose the evidence must be clear and unambiguous. With regard to the history of the family and their estate after the advent of the British Government, the evidence showed that whenever the holder of the estate died leaving more than one son, the right of the eldest son was challenged in the Courts and the litigation invariably ended in a compromise under which the younger sons obtained a share of the estate very much in excess of the maintenance to which, had the custom existed, they would have been entitled. The evidence, therefore, entirely failed to give to the alleged custom the character of certainty which was essential to its validity. **RAMAKANTA DAS MOHAPATRA v. SHAMANAND DAS MOHAPATRA** (1909) I. L. R. 36 Calc.

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Endowment—Creation of Endowment—Proof of Dedication to Idols—Alienation of endowed property—Construction of grant of Debutter property—Ancient Document—Evidence Act (I of 1872) s. 90—Power of Mohant to grant lease in perpetuity at fixed rent—Landlord and Tenant—Limitation Act (XV of 1877) Sch. II, Arts. 134, 144—Bona fide Purchaser. The origin of title to the property in suit was a sanad of 1787 granted by the Raja of Pandra to the predecessor in title of the plaintiff, the sebat of a shrine managed by Goswamis among whom the office of Mohant had descended for more than 100 years by the rule of lineal primogeniture, in the following terms:—"To the remembered and abode of all blessings, Sri Bichitrananda Mohant Goswami, of good character. This deed of pottah of debutter property is executed to the following effect. I do grant to you by way of lakheraj debutter the entire mouzah of Gorfalbari in pergunnah

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Pandra.... By bestowing your blessings on us you do enjoy and possess the same with fresh felicity. If I or any of my heirs ever dispossess you, the dis-possession shall be ineffectual." The evidence in the case showed that the donee received the gift as one for the service of the particular idols whose sebit he was, and that the income of the mouzah had ever since been entirely appropriated for that service. In 1860 the then Mohant describing himself as "brittibhogi-holder of *debuttar*," granted to the predecessor in title of the defendants a *mokurari pottah*, or permanent lease, of the mouzah in which it was described as "my long-standing ancestral lakheraj *debuttar* property endowed for the service of the deity." In a suit brought to set aside the lease as being beyond the powers of the Mohant and therefore void, it was contended by the defendants that though the grant was to the Mohant and "by way of lakheraj *debuttar*," there was no complete or specific dedication of the mouzah to the service of any idol, but that the gift was to the Mohant personally and descendible to his heirs:—*Held*, by the Judicial Committee (reversing the decision of the High Court) that, under the circumstances of, and on the evidence in, the case, the mouzah was *debuttar* property in the sense of having been dedicated to the worship of the idols represented by the Mohant to whom it had been originally granted. Though the mere fact of the proceeds of any land being used for the support of an idol may not be proof that that land formed an endowment for the purpose, yet it was a fact that might well be taken into consideration, when, as in this case, the intention of the founder had to be gathered from an ancient document expressed in ambiguous language. *Muddun Lall v. Komul Bibee*, 8 W. R. 42, followed. There was no allegation of any special circumstances of necessity to justify the grant of the lease

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which was subject to a fixed rent-charge, payment of which had all along been made to the Mohant:—*Held*, that the power of a Mohant to alienate *debuttar* property being, like the power of a Manager for an infant heir, limited to cases of unavoidable necessity [*Prosunno Kumari Debya v. Golab Chand*, 14 B. L. R. 450; L. R. 2 I. A. 145], a permanent lease at a fixed rent, though adequate at the time, was "a breach of duty in the Mohant," and on the most favourable construction could only enure for the life of the grantor and was not binding on his successors. *Shibes-souree Debia v. Mothooranath Acharjo*, 13 Moo. I. A. 270, followed. It was also contended that a *mokurari* lease was tantamount to a conveyance in fee simple, and that the lessees must, therefore, be treated as "purchasers" within the meaning of Article 134 of Schedule II of the Limitation Act (XV of 1877), and the suit was consequently barred by lapse of time, and the High Court so decided:—*Held* (reversing that decision), that the words "purchased for a valuable consideration" in that article meant that the ownership of the property sold had been absolutely transferred from the vendor to the purchaser in consideration of the price. But a lease in perpetuity left some interest in the lessor, and such a lease, though permanent, was forfeitable: *Kally Dass Ahiri v. Monmohini Dassee*, I. L. R. 24 Calc. 440. The purchaser must be the purchaser of an absolute title. The defendants were, therefore, not purchasers under Article 134, and the suit was not barred. *ABHIRAM GOSWAMI v. SHYAMA CHARAN NANDI* (1909) I. L. R. 36 Calc. ...

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—*Impartible Raj—Separation in estate, whether possible—Spes successionis—Cause of action—Leave to amend plaint.* In the case of an impartible Raj, during the life of the holder, the interest of a member of his family is only a *spes successionis*, which

Hindu Law—*contd.*

is not a subject for partition: also, there can be no separation in estate, as there is nothing upon which such separation can operate. An application for leave to amend the plaint, so as to disclose a cause of action, refused as being made at too late a stage of the case. *LALITESHWAR SINGH v. RAMESHWAR SINGH* (1900) I. L. R. 36 Calc. 481

—*Maintenance—Grant to junior members of family for.* *Main-tenance—“Babuana” property, nature of—Power of Grantees to alienate—Custom of Darbhanga Raj—Property not inalienable merely because it is impartible—Liability of “Babuana” to sale in execution of decree—Evidence of Custom.* Property granted as “babuana” to a junior male member of the Darbhanga Raj family in lieu of money maintenance was admittedly impartible, descending to the eldest male heirs of the grantee and being held and managed by the person to whom it descended for the maintenance of himself and his family. The Government revenue was conditioned to be paid by the grantee, or the person to whom the property descended, not directly to Government but through the Maharaja:—*Held*, that such property, though impartible, was not by reason of that fact inalienable. Property so granted may be alienable. *Udaya Aditya Deb v. Jadablat Aditya Deb*, I. L. R. 8 Calc. 199; L. R. 8 I. A. 248, *Sartaj Kuari v. Deoraj Kuari*, I. L. R. 10 All. 272; L. R. 15 I. A. 51, and *Venkata Surya Mahipati Rama Krishna Rao v. Court of Wards*, I. L. R. 22 Mad. 383; L. R. 26 I. A. 83, followed. Notwithstanding its impartibility the subject of such a grant came, in the absence of any special custom regulating its enjoyment, within the principle laid down in Manya's Hindu Law, 7th edition, page 415, paragraph 321, that “in cases governed by the Mitakshara Law a father may sell or mortgage, not only his own property in order to satisfy an antecedent debt of his own, not being of an illegal or immoral

Hindu Law—*contd.*

character and such transactions may be enforced against his sons by a suit, and by proceedings in execution to which they are no parties.” *Semble*: If the male descendant in whom property so granted was for the time being vested failed to pay the Government revenue as stipulated, and the Maharaja was himself obliged to discharge the claim of the Government, he might sue the defaulter for the amount so paid, and execute his decree by sale of the “babuana” property. A family custom to the effect that property granted for maintenance by a “babuana” grant was inalienable, was held to be not established. Absence of evidence of alienation without any evidence of facts which would make it probable that an alienation would have been made, cannot be accepted as proof of a custom of alienability. *Sartaj Kuari v. Deoraj Kuari*, I. L. R. 10 All. 272; L. R. 15 I. A. 51, followed. *DURGADUT SINGH v. RAMESHWAR SINGH* (1909) I. L. R. 36 Calc. 943

—*Pitridatta Ayantuka Stridhan, succession to—Son or married daughter, preferential heir—Dayabhaga—“Kanya,” meaning of—* Under the Dayabhaga School of Hindu Law, son is the preferential heir to a married daughter to *pitridatta ayantuka stridhan*, property of the mother. The word “kanya” in Dayabhaga, Chap. IV, s. ii, para. 16, means an unmarried daughter. *Ram Gopal Bhattacharjee v. Narain Chandra Bandopadhyaya*, I. L. R. 33 Calc. 315; 10 C. W. N. 510; 3 C. L. J. 15, followed. *PROSARNO KUMAR BOSE v. SARAT SHOSHI GHOSH* (1908) I. L. R. 36 Calc. 86

—*Shebaitship—Alienation of Shebaitship, inter vivos.* An alienation (*inter vivos*) of the office of *Shebait*, by an *arpannamah*, to a closely connected member of the family who seems to have more interest in the worship of the idol than any one else, and without any idea of personal gain, is valid under the Hindu law. *Mancharam v. Pran-*

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<i>shankar</i> , I. L. R. 6 Bom. 298, followed. <i>Rajeshwar Mullick v. Gopeshwar Mullick</i> , I. L. R. 35 Calc. 226, distinguished. <i>Khetter Chunder Ghose v. Hari Das Bundopadhya</i> , I. L. R. 17 Calc. 557, and <i>Rajaram v. Ganesh</i> , I. L. R. 23 Bom. 131, referred to. <i>NIRAD MOHINI DASSI v. SHIBADAS PAL DEWASIN</i> (1909) I. L. R. 36 Calc.	975	<i>Jurisdiction of Courts of Equity—Foreign Courts.</i> The jurisdiction of the High Court to restrain proceedings in Courts outside its jurisdiction is governed by the same principles as those that govern Courts of Equity in England, namely, that the party, whom it is sought to restrain, must be within the limits of the jurisdiction of the High Court, so that in the event of an injunction being granted against him and being disobeyed, he would be subject to process for contempt. <i>The Carron Iron Co. v. MacLaren</i> , 5 H. L. C. 416, followed. <i>Mungle Chand v. Gopal Ram</i> , I. L. R. 34 Calc. 101, not followed. A Court of Equity can only restrain a person from proceeding with a suit in a foreign Court, if the person sought to be restrained is within the jurisdiction of the Court. <i>VULCAN IRON WORKS v. BISHUMBHUR PROSAD</i> (1918) I. L. R. 36 Calc.	233
<i>Will, construction of—Direction as to management of property—Gifts—Express gift, or no words of gift—Partition—Widow's right to share on partition.</i> An express gift by will of property by a testator to his sons will defeat the right of a widow to a share on partition. <i>Dehendra Coomar Roy Chowdhry v. Brojendra Coomar Roy Chowdhry</i> , I. L. R. 17 Calc. 886, referred to. Where, however, a will contains no words of gift to the sons, but merely operates to postpone a partition of the property to a particular date with directions as to management in the meantime, the property vests in the widow as executrix for that purpose, and the sons take the property as on an intestacy and not by any bequest. <i>Kishori Mohun Ghose v. Moni Mohun Ghose</i> , I. L. R. 12 Calc. 165, <i>Sorolah Dassee v. Bhobun Mohun Neoghy</i> , I. L. R. 15 Calc. 292, referred to. Where a widow is entitled to a share on partition, her right is not affected by the fact that she had already inherited a share from one of her sons. <i>Jugomohan Hal'dar v. Sarodamoyee Dossee</i> , I. L. R. 3 Calc. 149, referred to. The share, which a widow takes as heiress of her son, is not stridhan property. <i>Jodoonath Dey Sircar v. Brojonath Dey Sircar</i> , 12 B. L. R. 385, referred to. <i>POORENDRA NATH SEN v. HEMANGINI DAS</i> (1908) I. L. R. 36 Cal.	75	<i>Immoveable property</i> : See TRESPASS	28
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		<i>Inheritance, right of</i> : See HINDU LAW—ADOPTION	824
		<i>Infant Beneficiary</i> : See TRESPASS	28
		<i>Injunction</i> : See CONTRACT	354
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		<i>Injury by Dogs, without provocation</i> : See DAMAGES, SUIT FOR	1021
		<i>Inland Navigation</i> : See MARINE INSURANCE	516
		Insolvency—Indian Insolvent Act (11 and 12 Vict., c. 21) s. 73—Practice—Appeal by petition—Petition by creditor not included in Schedule—Jurisdiction of High Court in its Appellate Jurisdiction—Distribution of Dividends. On an application for relief under s. 73 of the	

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Insolvent Act, to the High Court in its appellate jurisdiction by a creditor, whose claim at the time of the final discharge was by some inadvertence not entered in the schedule, the insolvent, however, having notice of and acknowledging the claim and knowing of the omission:— <i>Held</i> , that the High Court, in its appellate jurisdiction, had jurisdiction to intervene, and to order that the creditor be entered in the insolvent's schedule, and that he do rank as creditor, as well in respect of past as of future dividends. <i>In re H. R. COBBOLD, AN INSOLVENT</i> (1908) I. L. R. 36 Calc.	512	Judicial Proceedings : See COMPLAINT	72
— <i>Indian Insolvent Act (11 and 12 Vict., c. 21)—Jurisdiction—Summary proceeding—Order for Ejectment of Insolvent Tenant, on application of Landlord, whether valid.</i> On an application by the insolvent's landlord, who was an admitted creditor in respect of arrears of rent, for an order that the insolvent should make over possession of the premises to the Official Assignee:— <i>Held</i> , that there was nothing in the Insolvent Act, which enabled the Court, sitting in Insolvency, on a summary proceeding, to make at the instance of the landlord, what was virtually an order for ejectment against the tenant. <i>MAUD ANDERSON, In re</i> (1909) I. L. R. 36 Calc.	489	Jurisdiction : See COMMITMENT	48
Insolvent Act (11 and 12 Vict., c. 21) ss. 19, 21, 31 : See OFFICIAL ASSIGNEE	990	—————: See DIVORCE	964
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—————: See TRANSFER OF PROPERTY ACT (IV OF 1882) ss. 83, 84	840	—————: See TRESPASS	28
Interpreter, omission to administer oath to : See SANCTION FOR PROSECUTION	808	————— <i>Appeal—Trial of Summons Case—Conviction of Assault and mischief on summons for Criminal Trespass—Competence of Magistrate who issued process, but did not take cognizance or direct a local investigation, to hear appeal on conviction—Transfer—Irregularity—Criminal Procedure Code (Act V of 1898) ss. 192, 243, 244, 246, 529 (f), 556.</i> Where an accused has been summoned for criminal trespass, it is open to the trying Magistrate, under s. 246 of the Criminal Procedure Code, to convict him of assault and mischief without re-opening the trial and following the procedure laid down in ss. 243 and 244. <i>Mudoooodun Sha v. Hari Dass Dass</i> , 22 W. R. Cr. 40, referred to. A Magistrate who did not take cognizance of a complaint or order a local investigation but, acting as the officer in charge of the <i>sudder</i> subdivision, directed the issue of summonses, holding that the investigating Magistrate had not given satisfactory reasons for recommending the dismissal of the complaint without, however, expressing any clear opinion hostile to the accused, is not incompetent, under s. 556 of the Criminal Procedure Code, to hear the appeal on conviction of the accused. The irregularity of transferring a case, when the Magistrate is not empowered under s. 192 to do so is cured by s. 529 (f). <i>DASARATH RAI v. EMPEROR</i> (1909) I. L. R. 36 Calc.	869
Irregularity in transferring a criminal case : See JURISDICTION	869	————— <i>Landlord and tenant—Suit for land—Suit by lessee for rents and profits during absence—Lessor in possession—Letters Patent, 1865, cl. 12.</i> A, a lessee of certain premises outside the jurisdiction of the Court, having	

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vacated the premises on account of being sentenced to a term of imprisonment, on his release brought a suit against the lessor, who had in the meantime taken over possession, claiming the rents and profits arising therefrom pending the termination of the lease, and further claiming that the lessor during his absence became trustee for him. At the hearing, the lessor contended there was no cause of action as this was a suit for land. *Held*, that, inasmuch as the lessee was seeking to obtain possession of the premises by claiming the rents and profits from the lessor, he sought to do something, which directly affected the property, and therefore this was a suit for land outside the jurisdiction of the Court and must be dismissed. *Delhi and London Bank v. Wordie*, I. L. R. 1 Calc. 249, *Kellie v. Fraser*, I. L. R. 2 Calc. 445, and *Hara Lal Bannerjee v. Nitambini Debi*, I. L. R. 29 Calc. 315, followed. *Rungs Lal Lohea v. John Wilson*, I. L. R. 26 Calc. 204; 2 C. W. N. 718, distinguished. *EBRAHIM ISMAIL TIMOL v. PROVAS CHANDER MITTER* (1908) I. L. R. 35 Calc. :

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—*Re-transfer—District Judge—Civil Procedure Code (Act XIV of 1882) ss. 13 and 25—The Bengal, N. W. P. and Assam Civil Courts Act (XII of 1887) ss. 9 and 18—Inherent power—Waiver of jurisdiction—Res judicata—Mortgage, subrogation of—Compromise decree, when binding.* A suit was instituted originally in the Court of the second Subordinate Judge; the District Judge transferred the case to his own Court acting in the exercise of the powers conferred on him by s. 25 of the Code of Civil Procedure (Act XIV of 1882). Subsequently, the District Judge transferred the case to the first Subordinate Judge as he himself was about to proceed on leave. The case was tried by him and no objection was taken by either party to the effect that the Subordinate Judge had no jurisdiction to try the case. On an

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objection taken as to the want of jurisdiction, *Held* that, inasmuch as under s. 9 of Act XII of 1887 the District Judge had administrative control over all the Civil Courts within the local limits of his jurisdiction, he had inherent power to transfer the case from his own Court to that of a Subordinate Judge, especially when the order was for the obvious benefit of the litigants and for the speedy determination of the matter. *Held* further, that under s. 18 of Act XII of 1887, the Subordinate Judge, unquestionably possessed jurisdiction over the subject-matter of the litigation, and that therefore the case was not one of absolute want of jurisdiction, but was at best an irregular assumption of jurisdiction; and as no objection at an earlier stage of the proceedings was taken by the defendants appellants, they waived their right to take exception to the power of the Subordinate Judge to try the cause under authority of an order of transfer made by the District Judge. To determine the question of *res judicata*, it is essential to ascertain what were the rights in dispute between the parties, and what were alleged between them, and this must be done not merely from the decree, but also from the pleadings and judgment. *Surjiram Marwari v. Barhamdeo Persad*, 1 C. L. J. 337, and *Magniram v. Mehdi Hossein Khan*, I. L. R. 31 Calc. 95, referred to. In a suit to enforce a second mortgage, the first mortgagee is not a necessary party. Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, there must be an adjudication, and in such a case the adjudication will be *res judicata* between the defendants as well as between the plaintiff and the defendants; but for this there must be a conflict of interest amongst the defendants and the judgment must define the real rights and obligations of the defendants *inter se*. *Magniram v. Mehdi Hossein Khan*, I. L. R.

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31 Cal. 95. *Chajju v. Umrao Singh*, I. L. R. 22 All. 386, *Balambhat v. Narayanbhat*, I. L. R. 25 Bom. 74, *Muhammad Kuni Rowthan v. Visvanathaigar*, I. L. R. 26 Mad. 337, and *Cottingham v. Earl of Shrewbury*, 3 Hare 627, referred to. To entitle one to invoke the equitable right of subrogation, he must either occupy the position of a surety of the debt or must have made the payment under an agreement with the debtor or creditor that he should receive and hold an assignment of the debt as security, or he must stand in such a relation to the mortgaged premises that his interest cannot otherwise be adequately protected. The doctrine of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation, being under no obligation to make the payment and not being compelled to do so for the preservation of any rights or property of his own. Subrogation is by redemption, and, unless there is redemption, no subrogation can take place. Where, therefore, sums paid by a subsequent mortgagee were applied only in part satisfaction of the claim for interest due upon earlier bonds, a claim for subrogation could not arise. The rule is, that before one creditor can be subrogated to the rights of another, the demand of the latter must be entirely satisfied so that he shall be relieved from all further trouble, risk and expense. *Merritt v. Hosmer*, 11 Gray 276; 71 Am. Dec. 713. *Street v. Beal*, 16 Iowa 68; 85 Am. Dec. 504. *O'Reilly v. Holt*, 4 Wood C. C. 645; 18 Fed. Cases 792, *Carter v. Neal*, 24 Georgia 346; 71 Am. Dec. 136, and *Hollingsworth v. Floyd*, 2 Harris & Gill (Maryland) 91, referred to. A petition of compromise, in so far as it relates to properties in suit, does not require registration under s. 17 of the Registration Act (III of 1877), and the decree,

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in so far as it gives effect to the settlement touching such properties, operates as *res judicata*. If it gives effect to the settlement touching properties extraneous to the litigation, the decree is to that extent without jurisdiction and is inoperative. In relation to these extraneous properties, the parties must fall back upon the petition itself, which cannot without registration effectively declare or create a title to immoveable property exceeding one hundred rupees in value. *Pranal Anni v. Lakshmi Anni*, I. L. R. 26 I. A. 101; I. L. R. 22 Mad. 508, *Muthayya v. Venkataratnam*, I. L. R. 25 Mad. 553, *Bishhadra Rath v. Kalpataru Panda*, I. C. L. J. 388, *Kali Charan Ghosal v. Ram Chandra Mandal*, I. L. R. 30 Cal. 789, *Patha v. Esup*, I. L. R. 29 Mad. 365, *Achutaramraja v. Subbaraju*, I. L. R. 25 Mad. 7, referred to. **GURDEO SINGH v. CHANDRIKAH SINGH (1907) I. L. R. 36 Cal.** 193

Jurisdiction of High Court : See CIVIL PROCEDURE CODE (ACT XIV OF 1882) ss. 244, 295, 622 130

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Jurisdiction of High Court in its Appellate Jurisdiction : See INSOLVENCY 512

Jurisdiction of Magistrate : See TOLLS 986

.....: **See CRIMINAL PROCEDURE CODE (ACT V OF 1898) ss. 145, 192 (2), 529** 370

Jury : See CHARGE 287

Jury, opinion of, in case of divided verdict : See REFERENCE TO HIGH COURT 629

Justification, plea of : See LIBEL 883

Kanya, meaning of : See HINDU LAW 86

Land with standing crops : See THEFT 758

Land Acquisition Act (I of 1894) : See COMPENSATION 967

Landlord and Tenant : See HINDU LAW—ENDOWMENT 1003

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- Notice to quit**—
Denial of landlord's title in the written statement, whether such denial makes Notice unnecessary—Reasonable Notice. In a suit for ejectment under the Bengal Tenancy Act, a landlord is not relieved of the obligation to give notice to quit to the tenant, where the tenant for the first time denies the title of the landlord in his written statement. The notice must be a reasonable notice, and it need not necessarily determine the tenancy at the end of the year. It will be for the final Court of fact in each case to determine what is reasonable notice having regard to all the circumstances, and whether it would not be reasonable in the circumstances of the particular case for it to determine with the year. *PRATAP NARAIN DEO v. HARIHAR SINGH* (1909) L L R. 36 Calc. 927
- "Last resided together": See DIVORCE** 964
- Lease—Covenant restraining Alienation—Assignment notwithstanding such covenant, whether operative.** A lease contained a covenant in these terms: "you (the lessee) shall not be able to dig pits and tanks or to transfer the land in any way without a letter from me to that effect." There was no right of re-entry reserved. The lessee assigned her interest under the lease:—*Held*, that the assignment was operative notwithstanding the covenant. *Williams v. Earle*, L L R. 3 Q. B. 739, referred to. *BASARAT ALI KHAN v. MANIRULLA* (1909) L L R. 36 Calc. 745
- Covenant—Calcutta Municipal Act (Bengal Act III of 1899) s. 556—Tenders, invitation of, when not obligatory—Specific Relief Act (I of 1877) s. 45—Mandamus.** Section 556 of the Calcutta Municipal Act enables the Corporation to lease any property vested in them on any terms they think fit, without previously calling for any tenders: however, the form of a lease cannot be given to a transaction, which properly falls under section 88 of the Act. Although a covenant in a lease, or in res-

- pect of a lease, is in a sense a contract; if it relates to the demised premises and is not independent of them, it does not fall within the purview of section 88 of the Calcutta Municipal Act, and it is not obligatory upon the Corporation to call for tenders in respect of such a contract. *In the matter of JOGENDRA NATH MUKHUTI AND OTHERS* (1908) L L R. 36 Calc. 271
- Bengal Tenancy Act (VIII of 1885) s. 29—Leases in contravention of s. 29 of the Bengal Tenancy Act—Effect of payment of rent for a number of years—Onus of proving increase of area.** Leases executed in contravention of the provisions of section 29 of the Bengal Tenancy Act are void and not voidable, though rent has been paid under them for a number of years. *Probat Chandra Gangapadhyaya v. Chirag Ali*, L L R. 33 Calc. 607, referred to. A contract of such a nature is not legal or operative to the extent of the enhancement allowed by the rent law. *Kristodhone Ghose v. Brojo Gobindo Roy*, L L R. 24 Calc. 395, referred to. When it is shown what the previous rent of the tenant defendant was, it is for the plaintiff to justify the enhancement of rent claimed, which is obviously in excess of the enhancement allowed by the Act. *MANINDRA CHANDRA NANDI v. UPENDRA CHANDRA HAZRA* (1908) L L R. 36 Calc. 604
- : **See RECEIVER** 52
- Limitation Act (XV of 1877) s. 22. Parties, addition of—Limitation—Moujdarri Lease—Fraud—Suit to recover Possession—Notice to quit—Chutia Nappur Encumbered Estates Act (VI of 1876), as amended by Act V of 1844, ss. 7, 12, 17, and 18—Manager's power to grant Lease in Perpetuity—Liability, notice of—Specific Performance—Rule against Perpetuities—Covenant running with the Land.** Section 22 of the Limitation Act applies to a case even where a person is not a necessary party, but only a proper party to a suit, and such a person cannot be added as a party after

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the expiry of the period of limitation as provided for by that section. *Ravji v. Mahadev*, I. L. R. 22 Bom. 672, and *Guruvayya v. Dattatraya*, I. L. R. 28 Bom. 11, dissented from. *Abdul Rahman v. Amir Ali*, I. L. R. 34 Calc. 612, followed. In a suit to recover possession of a certain land by setting aside a *mocurrari* lease, granted by the manager under the Chutia Nagpur Encumbered Estates Act (VI of 1876), on the ground that it was obtained by the lessee by fraudulent misrepresentation, it was objected to that a tenancy from year to year was created between the manager and the defendant by the payment and acceptance of rent under the lease, and that, therefore, the suit was not maintainable without a valid notice to quit:—*Held, per Doss J.*, that the lease being a voidable one, when rent was paid under such a lease, the payment of rent was under the lease, and was in satisfaction of the recurrent obligation arising out of the legal relation created by the lease. So long as the legal relation was not dissolved the obligation to pay rent continued. On the other hand, as soon as that relation was determined, the obligation to pay rent which is dependent on the continuance of such relation ceased; and the payment of rent made in fulfilment of such obligation must thenceforth necessarily cease to have any legal effect, and, therefore, if the lease was cancelled on the ground of fraud, the lessee could not resist delivery of possession for the demised land to the lessor on the ground that, despite the cancellation and delivery of the lease, there was yet a subsisting tenancy outstanding which entitled him to retain possession of land until such tenancy was determined by proper notice to quit. *Held, per Richardson J.*, that having regard to the frame of the suit, notice to quit was unnecessary. A manager appointed under Chutia Nagpur Encumbered Estates Act has power to grant a lease in perpetuity with or without fine, only in case

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money is required for the settlement of debts and liabilities of the proprietor. A executed in favour of W an *ijara* lease for a term of years; the lease, amongst others, contained the following covenant on the part of the lessor:—"If out of the *ijara* mehal you require any land for the purpose of erecting any indigo factory or silk factory or excavating any *bund* or tank, or for construction of any cutchery house, I shall grant you a *mourasi mocurrari pottah* for it on proper rent." W on obtaining the lease constructed on a portion of the *ijara* mehal an indigo factory. Subsequently, A's estates were taken over under the Chutia Nagpur Encumbered Estates Act, and the Deputy Commissioner was appointed manager under the Act. The rights and interests of W in the *ijara* lease were assigned to M, who, before the termination of the said lease, applied to the manager for a *mocurrari* lease of the lands on which indigo vats, etc., were erected. The manager with the sanction of the Commissioner of Chutia Nagpur Division executed a *mocurrari* lease in respect of the said lands. On a suit brought by A after the release of the estate from the operation of the Encumbered Estates Act, to recover possession of the lands by setting aside the *mocurrari* lease, *inter alia*, on the ground that the manager had no such power to grant such a lease without the consent of the proprietor:—*Held, per Doss J.*, *RICHARDSON J.* concurring as to (i) and (ii), that under the amending Act (V of 1884), (i) the manager was entitled to sell or demise in perpetuity without such consent; (ii) that the mere absence of notice of the debts and liabilities as contemplated by s. 7 of the Act, was not a valid ground for setting aside the lease; (iii) that the lease was a valid lease, and if a suit for specific performance of the covenant had been brought by M against the manager, it would have been allowed, inasmuch as the covenant did not infringe the rule against perpetuities; (iv) that

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there was a substantial part-performance of the covenant for a perpetual lease such as would entitle the covenantee to claim specific performance of the covenant, on the ground that it would be inequitable and fraudulent for the covenantor to refuse to perform the covenant; and (v) that M was entitled to the benefit of the covenant as it was one running with the land, and that the covenant did not inflict any hardship on A. <i>Held, per</i> RICHARDSON J., that it was, in the circumstances, unnecessary to consider whether specific performance of the covenant would have been granted. <i>MATHEWSON v. RAM KANAI SINGH DEB</i> (1909) I. L. R. 36 Calc. ..	675
Lease in Perpetuity : See LEASE ..	675
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Legal Representative—<i>Civil Procedure Code (Act XIV of 1882) ss. 371, 582—Death of one defendant—Representative of deceased defendant, when can be substituted—Omission to substitute at death of defendant, effect of—Agreement between surviving defendant and plaintiffs.</i> Where the legal representatives of a deceased defendant (who died after appealing to the lower Court and before the appeal to the High Court) were under the impression that the co-defendant was prosecuting the appeal and challenging the validity of the entire decree, they could not be blamed for their omission to take any steps to have themselves brought on the record, and they ought to be allowed leave to step in and revive and prosecute the appeal on their own behalf on their discovering that the plaintiff had by arrangement relieved the co-defendant of all responsibility and thrown the burden upon the legal representatives of the deceased defendant. <i>CHANDRA KUMAR MAJHI v. SANDHYAMANI</i> (1909) I. L. R. 36 Calc. ..	418
Legislature, powers of : See LIMITATION ACT, SCH. II, ART. 180 ..	543
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Letters of Administration, application for, by Legal Representative of Executor : See RIGHT to SUBS.	799
Letters Patent, 1865, cl. 12 : See JURISDICTION ..	59
TRESPASS ..	433
Libel—<i>Master and Servant—Publication—Libel by Servant—Scope of Employment—Trade Libel—Libel on Firm—Parties—Privilege—Privileged Occasion—Malice—Evidence of Malice.</i> A master is liable for a libel written and published by his servant within the scope of his employment. <i>Citizens' Life Assurance Co. v. Brown</i> [1904] A. C. 423, followed. In a suit for libel defamatory of a firm, all the partners should join as plaintiffs. <i>Le Fanu v. Malcolmson</i> , 1 H. L. C. 637, and <i>Robinson v. Marchant</i> , 7 Q. B. 918, referred to. Where there co-exists an interest in the subject-matter of a communication, both in the party making it and in the party to whom it is made, the occasion is a privileged one. <i>Hunt v. Great Northern Railway Co.</i> [1891] 2 Q. B. 189, followed. Where the occasion is privileged, the burden of proving actual malice lies on the plaintiff. <i>Hebditch v. Mac Iwaine</i> [1894] 2 Q. B. 54, referred to. To prove malice, extrinsic evidence of malice is not necessary. The words of the libel and the circumstances attending its publication may themselves afford evidence of malice. <i>Clark v. Molyneux</i> , L. R. 3 Q. B. D. 437, <i>Laughton v. The Bishop of Sodor and Man</i> , L. R. 4 P. C. 295, <i>Nevill v. Fine Arts and General Insurance Co.</i> [1895] 2 Q. B. 156, and <i>Gilpin v. Fowler</i> , 9 Ex. 615, referred to. <i>MATI LAL RAHA v. INDRA NATH BANERJEE</i> (1909) I. L. R. 36 Calc. ..	907
—<i>Plea of Justification—Proceedings in Parliament—Privilege—Fair Comment—Mis-statement of Facts—Hansards' Parliamentary Report—Imputation of Criminal Offence—Damages, assessment of—Deportation under Regulation III of 1818.</i> In an action for	

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libel if the defendant withdraws the plea of justification, the statements of facts so far as they relate to the plaintiff are presumed in law to be untrue. A fair and accurate report of the proceedings in Parliament is privileged even though defamatory. But this privilege is limited to the report of the proceedings. *Wason v. Walter*, L. R. 4 Q. B. 73, referred to. If the defendant makes a mis-statement of any of the facts upon which he comments, it at once negatives the possibility of the comment being fair. In order to give room for the plea of fair comment, the facts must be truly stated. Such a plea does not extend to cover mis-statements of fact, however *bona fide*. *Davis & Sons v. Shepstone*, 11 App. Cas. 187, *Popham v. Pickburn*, 7 H. & N. 891, *Peter Walker & Son, Ltd. v. Hodgson*, [1919] 1 K. B. 239, *Digby v. The Financial News, Ltd.* [1907] 1 K. B. 502, *Hunt v. The Star Newspaper Company, Ltd.* [1908] 2 K. B. 309, and *Thomas v. Bradbury, Agnew & Co., Ltd.* [1906] 2 K. B. 627, referred to. Imputing to a person the commission of a criminal offence does not fall within the range of fair comment. *Barrow v. Hem Chunder Lahiri*, 1 L. R. 35 Cal. 495, followed. In assessing the damages in an action for libel, the whole conduct of the defendants from the time of the libel down to the time of the judgment should be looked at. *Prad v. Graham*, 24 Q. B. D. 53, referred to. In an action for libel, the fact that the plaintiff was deported under the provisions of Regulation III of 1818 should not be taken into consideration as a ground for mitigation of damages. *Lajpat Rai v. "The Englishman," Ltd.* (1909) 1 L. R. 36 Cal. 883

Libel on Firm : See LIBEL 907

Libel by Servant : See LIBEL 907

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Life Interest with remainder over :
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—————: *Distrain—Compensation, suit for—Illegal distress—Limitation Act (XV of 1877) Sch. II, Arts. 36, 39, 49—Tort—"Malfeasance"—"Trespass upon immoveable property."*—Per RAMSAY, A. C. J. A suit for compensation for illegal distress, and cutting and carrying off standing crops is governed by Art. 36, Sch. II of the Limitation Act, such acts of tort constituting "malfeasance" within the terms of that Article. *Mokesh Chandra Das v. Hari Kar*, 9 C. W. N. 376, approved. *Mangun Jha v. Dolhin Golab Koer*, 1 L. R. 25 Cal. 692, distinguished. Per Doss J. Wrongfully cutting and carrying away crops amount to "trespass upon immoveable property" and to "wrongfully taking specific moveable property" within the meaning of Arts. 39 and 49, Sch. II of the Limitation Act; and a suit for compensation for such acts is governed partly by Art. 39 and partly by Art. 49 of the Act.—*Mangun Jha v. Dolhin Golab Koer*, 1 L. R. 25 Cal. 692, referred to. *Jadu Nath Dandput v. Hari Kar* (1908) 1 L. R. 36 Cal. .. 141

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—————: s. 22 : See LEASE 675

—————: s. 25 : See MARINE INSURANCE 516

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Art. 180—"Revivor of judgment," meaning and effect of—*Scire facias*, analysis of—Legislature, its power to alter laws and correct errors of Courts and signification of its silence—Civil Procedure Code (XIV of 1882)

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Limitation Act (XV of 1877)—<i>contd.</i>	Limitation Act (XV of 1877)—<i>concl'd.</i>
<p>ss. 234, 250—<i>Formal application for substitution of deceased decree-holder, not absolutely necessary—Two Codes, not to be so construed as to be conflicting—Civil Procedure Code (V of 1908) s. 48.</i> When the legislature used the term "revivor of judgment" in the Limitation Acts of 1871 and 1877, they had in view the procedure embodied in s. 216 of the Code of Civil Procedure of 1859 and s. 248 of the Code of 1877 and also the proceedings to revive then current in the Supreme Court, which were closely analogous to the (English) Common Law Procedure Act of 1852. <i>Scire facias</i> analyzed and its history traced. There is the same provision for revivor of judgments under the present law as there was under the old Statutes of Limitation. <i>Tincourie Dawn v. Debendro Nath Mookerjee</i>, I. L. R. 17 Calc. 491, dissented from. <i>Ashootosh Dutt v. Doorga Churn Chatterji</i>, I. L. R. 6 Calc. 504, followed. <i>Monohar Das v. Futteh Chand</i>, I. L. R. 30 Calc. 979, explained and distinguished. The balance of authority preponderates largely in favour of the view that the Statute of Limitation to which a judgment is subject ceases to run upon a <i>revivor</i> of the judgment, where the matter is not governed by Statute. The English case law on the point dealt with. It is a well-settled principle of construction that the Legislature is presumed to know not only the general principles of law but the construction which the Courts have put upon particular Statutes. English and American leading cases cited. The principle of construction above enunciated is based on the ground that, as Legislature knows what the law is and has the power to alter, any mistake on the part of the Judges may at once be corrected, and the absence of any such correction, specially during a long period of time, indicates that the Courts have rightly ascertained the intention of the Legislature. <i>Phelan v. Johnson</i>, 7 Ir. L. R. 535, followed. Section 230 of the Code</p>	<p>of Civil Procedure, 1882, ought not to be so construed as to make it conflict with the provisions of Art. 180 of the Limitation Act of 1877. <i>Mayabhai Prembhai v. Tribhuvandas Jagjivandas</i>, I. L. R. 6 Bom. 258, <i>Ganapathi v. Balasundara</i>, I. L. R. 7 Mad. 540, and <i>Futteh Narain Chowdhry v. Chundrabati Chowdhraim</i>, I. L. R. 20 Calc. 551, followed. Code of Civil Procedure of 1908, s. 48, noticed in this connection. It is not necessary for the remaining decree-holders to make a <i>formal</i> application for substitution of a deceased decree-holder. Section 234 of the Code merely requires that the legal representative should apply for execution of the decree and that his name should be brought on the record. <i>Syed Nadir Hossein v. Baboo Pearoo Thovildarince</i>, 19 W. R. 255, and <i>Balkishoon v. Mahommed Tamaz Allee</i>, 4 All. H. C. 90, referred to. JOGENDRA CHANDRA ROY v. SHYAM DAS (1909) I. L. R. 36 Calc. 543</p> <p>Lunar Month : See MARINE INSURANCE 516</p> <p>Magistrate : See COMPLAINT 72</p> <p>----- : See EUROPEAN BRITISH SUBJECT 163</p> <p>Magistrate as "Court" : See TRESPASS 433</p> <p>Magistrate, competence of, to hear appeal : See JURISDICTION 899</p> <p>Magistrate, jurisdiction of : See TOLLS 986</p> <p>Mahomedan Law—Trust deed—Life interest with remainder over—Gift to unborn persons. A deed creating a life interest with remainder over is void under the Mahomedan Law. Similarly, a gift to unborn persons is void. <i>Shahebzadah Mahmud Faradoon Jah v. Shahebzadi Fakir Johban Begum</i>, suit No. 121 of 1907 (unreported), <i>Shahebzadah Mahomed Atdool Hossain v. The Official Trustee of Bengal</i>, suit No. 567 of 1908 (unreported), and <i>Shahebzadah Mahomed Mouzzum-uddeen v. The Official Trustee of Bengal</i>, suit No. 791 of 1901 (unreported), followed. <i>MAHOMED SHAH v. OFFICIAL TRUSTEE OF BENGAL</i>. (1909) I. L. R. 36 Calc. 431</p>

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----- <i>Wakf property—</i>		before the police, but did virtually	
<i>Jurisdiction.</i> Under Mahomedan		fabricate false evidence to procure	
Law, the High Court has jurisdic- tion to authorise dealings with <i>wakf</i> property. <i>Skama Churn Roy</i> <i>v. Abdul Kabeer</i> , 3 C. W. N. 158, followed. <i>In the matter of</i> <i>WOOZATUNN ESSA BIBEE</i> (1908) I. L. R. 36 Calc.	21	the plaintiff's conviction, and there is a want of reasonable and pro- bable cause for the institution of the criminal case, the defendant must be held to be the real and virtual prosecutor and liable for damages. <i>Bhul Chand Patro v.</i> <i>Palun Bas</i> , 12 C. W. N. 818, foot- note, followed. <i>HARI CEARAN</i> <i>SANT v. KAILASH CHANDRA</i> <i>BHUYAN</i> (1908) I. L. R. 36 Calc. . .	278
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the wife does not make the pro- nouncement of <i>talak</i> void and inefficacious. <i>Furund Hossain v.</i> <i>Janu Bibi</i> , I. L. R. 4 Calc. 588, and <i>Sarabai v. Rabat'ai</i> , I. L. R. 30 Bom. 537, referred to and discussed. <i>FUL CHAND v. NAZAB</i> <i>ALI CHOWDHRY</i> (1908) I. L. R. 36 Calc.	184	Market-rate : See DAMAGES, MEASURE OF	617
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<i>contract stipulating wife's option</i>		Marine Insurance—Inland Navigation	
<i>to divorce herself on husband marry-</i>		----- <i>Construction of Policy—Warranty</i>	
<i>ing again, when to be exercised.</i>		----- <i>Condition precedent—Impossibility</i>	
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by the marriage contract to di- vorce herself on her husband marrying again, if the husband does marry again, she is not bound to exercise her option at the very first moment she hears the news. The injury done to her is a con- tinuing one and she should have a continuing right to exercise the power. The case is different when such a power is given to the wife after marriage. <i>Meer Ashruf Ali</i> <i>v. Meer Ashad Ali</i> , 16 W. R. 260, and <i>Nuruddin v. Mussummat</i> <i>Chenuri</i> , 3 C. L. J. 49, followed. <i>Hamideola v. Fatunnissa</i> , I. L. R. 8 Calc. 327, applied. <i>AYATUN-</i> <i>NESSA BEBEE v. KARAM AII</i> (1908) I. L. R. 36 Calc.	23	----- <i>“Month,” meaning of, in a contract</i>	
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Maladministration : See TRESPASS	28	policy of insurance covering a cargo of jute on the voyage from Ghur to Calcutta against the adventures and perils of rivers and inland navigation including fire risks, contained, <i>inter alia</i> , the following conditions and warranties:—“It is further warranted:—2. That the risk of loss or damage by fire is not insured hereby unless ex- pressly so stated in writing hereon, in which case such fire risk shall be subject to the following additional conditions:—(a) Any loss occu- sioned by smoking or cooking having been carried on in the said boat shall not be recoverable hereunder. 8. That no smoking nor cooking shall be carried on in the said boat, but in a dinghy pro- vided for the purpose. 9. That in the event of loss:—(a) The Manji or Charaudar must report to the nearest Police Station within 24 hours and must state that the cargo is insured. (b) It is furthermore hereby expressly pro- vided, that no suit or action of any kind against the said Company for the recovery of any claim upon, under or by virtue of this policy, shall be sustainable in any Court	
Malfeasance : See LIMITATION	141		
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did not only lodge the complaint			

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of law or equity unless such suit or action shall be commenced within the term of six months next after any loss or damage shall occur; and in case any such suit or action shall be commenced against the said Company after the expiration of six months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced." In an action on the policy instituted by the assured, it was alleged in the plaint which was filed on the 15th April 1907, that the cargo was destroyed by fire on the 14th October 1906:—*Held* that the term "warranty" as used in a policy of Marine Insurance is used to denote two different kinds of conditions: (i) a condition to be performed by the assured, and (ii) an exception from or limitation on the general words of the policy. In the first case the warranty is a condition precedent to the policy, whether it be precedent to the effectual making of the policy, or precedent to the accrual of the right to sue thereon or whether it declares the events in which forfeiture ensues, or deals with the mode of settling disputes, or limits the period for bringing a claim; in all such cases, whether the conditions be material to the risk or not, they must unless waived be fulfilled with the most scrupulous exactness; and if not so fulfilled, there is a breach of an express stipulation which is one of the essential terms of the contract and the insurer is discharged from liability as from the date of the breach of warranty: the assured must prove that he has complied with all such warranties as being conditions precedent to the policy attaching, or that the performance thereof has been effectually waived. *Pawson v. Walton*, 2 Cowp. 785, *Thomson v. Weems*, L. R. 9 App. Cas. 671, *Barnard v. Faber* [1893] 1 Q. B. 340, referred to. The warranty in clause 2 (a) was an exception from the risk which the insurers

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were willing to undertake, and under it the onus of proving that the cargo was destroyed by fire, caused by cooking or smoking would lie on them. *Boyd v. Dubois*, 3 Camp. 133, referred to. Clause 8 was a condition precedent to the liability of the insurers under the policy, and the onus of proving compliance was on the assured. Clause 9 (a) was similarly a condition precedent: the fact that the condition might be impossible of fulfilment could not affect the liability. *Worsley v. Wood*, 6 T. R. 710, and *Law v. George Neumes*, 31 Sc. L. R. 858, referred to. Notwithstanding the provisions of the General Clauses Act and the Indian Limitation Act, the term "month" in a contract, means in India, as in England "lunar month" and not "calendar month." *Simpson v. Margetson*, 17 L. J. Q. B. 81, *Turner v. Barlow*, 3 F. & F. 946, *Bruner v. Moore* [1904] 1 Ch. 305, *Hart v. Middleton*, 2 C. & K. 9, referred to. Clause 9 (f) was a condition precedent and had not been complied with. *Scoble*: even if the term "month" in the policy meant "calendar month," the plaintiff was out of time. *Radcliffe v. Bartolomew* [1892] 1 Q. B. 161, referred to. *SOUTH BRITISH FIRE AND MARINE INSURANCE CO. v. BROJO NATH SHARMA* (1909) 1 L. R. 36 Calc. ...

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Master, liability of, for misconduct of servant: See *MASTER AND SERVANT* ...

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Master and Servant: See *LIBEL* ...

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----- *Misappropriation by Servant—Fraud—Liability of Master for misconduct of Servant—Misappropriation by Employees of Government—Secretary of State, liability of—Principal and Agent.* The rule of law with regard to the liability of the master for misconduct of the servant is that a master is liable for the fraud of his servant committed in the course of his service and for the master's

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benefit, though it is not necessary that the benefit should accrue to the master; and that a master is not liable for misconduct of the servant committed for the servant's own private benefit. A cheque was given to the plaintiff by the District Board for repairs done to certain roads. On presentation of the cheque for payment at the Government Treasury Office, the amount was not paid to the plaintiff, but was misappropriated by the *poddar* and a *mohurer* employed in the Treasury to their own use. The plaintiff brought a suit for the recovery of the amount against those officers of the Treasury as well as the Secretary of State for India:—*Held*, that the Secretary of State was not responsible for the misappropriation by his employees, the misappropriation not being within the scope of the duties entrusted to them. The fraud and misappropriation were not committed either for the benefit of the Secretary of State or for purposes of the agency. *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259, *Houldsworth v. City of Glasgow Bank*, L. R. 5 A. C. 317, *British Mutual Banking Company, Ltd. v. The Charnwood Forest Railway Co.*, L. R. 18 Q. B. D. 714, *Burmah Trading Corporation, Ltd. v. Mirza Mahomed Ally Sherazee*, L. R. 5 I. A. 130, *McLaren Morrison v. Verschoyle*, 6 C. W. N. 429, *Moti Lal Ghose v. Secretary of State for India*, 9 C. W. N. 495, *Lall Chand v. The Agra Bank, Ltd.*, L. R. 18 I. A. 111, referred to. *GOPAL CHANDRA BHATTACHARJEE v. THE SECRETARY OF STATE FOR INDIA* (1909) I. L. R. 36 Calc. . . . 647

Merchandise booked as 'Luggage,' loss of: See RAILWAY COMPANY 819

"Mere Right to sue": See ASSIGNMENT 345

Merger—Mokarari interest—Merger of mokarari interest in superior landlord's interest—Transfer of Property Act (IV of 1882) ss. 2 cl. (c), (d); 111 cl. (d). The original owner of a share in a certain *mouza* granted a *mokarari* of it to

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her grandson, W., conditional on her daughter, F., enjoying the *usufruct* of the *mokarari* for life, and subsequently she sold to her daughter her proprietary interest in the share. Prior to the sale of the proprietary interest, but subsequent to the grant of the *mokarari* and the *usufruct*, the original owner and the *mokararidar* mortgaged their interest to R. On the 17th September 1892, the defendant purchased the *mokararidar's* interest in the share subject to the mortgage. On the 7th October 1898, R. obtained a decree in a suit brought on his mortgage against F., W. and the defendant, and finally became the purchaser of the proprietary and the *mokarari* interest of the share at an auction sale. The defendant, however, failed to exercise his right of redemption. In consequence of default made in payment of the revenue, R.'s interest in the property was sold on the 25th April 1899 under the Revenue Sale Law, and was purchased by D. A further default having been made by D., the latter's interest in the property was sold and the plaintiff purchased the same. The plaintiff, thereupon, brought a suit for *khas* possession and mesne profits against the defendant who claimed the *mokarari* interest under his purchase from W. subject to R.'s mortgage:—*Held*, that the *mokarari* merged in the proprietary rights in the hands of R., and that the case was governed by the Transfer of Property Act, s. 111 (d). *Raja Kishendatt Ram v. Raja Muntaz Ali Khan*, I. L. R. 5 Calc. 198, and *Surja Narain Mandal v. Nanda Lal Sinha*, I. L. R. 23 Calc. 1212, followed. *Sibanti Nath Khan v. Gokool Chunder Chowdry*, I. L. R. 19 Calc. 780, and *Promotho Nath Mitter v. Kali Prasanna Chowdhry*, I. L. R. 28 Calc. 744, discussed. *ULFAT HOSSAIN v. GAYANI DASS* (1910) I. L. R. 36 Calc. 802

Minor—Contract with Minor—Benefit of Minor—What are 'Necessaries'—Wedding Presents—Guardian.

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<p><i>Discharge or Death of—Majority Act (IX of 1875) s. 3—Guardians and Wards Act (VIII of 1890) s. 52.</i> Where a guardian has once been validly appointed or declared, the minority does not cease till the attainment of 21 years by the ward, and it is immaterial whether the guardian dies or is re-moved, or otherwise ceases to act. <i>Rudra Prokash Misser v. Bhola Nath Mukherjee</i>, I. L. R. 12 Calc. 612. <i>Kharakash Ali v. Surju Prasad Singh</i>, I. L. R. 3 Ail. 598, <i>Gorihardas v. Harivalubhdas</i>, I. L. R. 21 Bom. 281, and <i>Gopal Chunder Bose v. Gonesh Chunder Sremani</i>, 4 C. L. J. 112, referred to. <i>Patesri v. Chamra Lal</i>, 11 Ail. W. N. 118, dissented from. <i>Birj Mohun Lal Rudra Perkash Misser</i>, I. L. R. 17 Calc. 944, explained. <i>Shivram v. Krishnabai</i>, I. L. R. 31 Bom. 80, <i>Yeknath v. Warubai</i>, I. L. R. 13 Bom. 285, and <i>Munguram Marwari v. Gursahai Nand</i>, I. L. R. 17 Calc. 347, referred to. <i>Nagardas Vachraj v. Anandrao Bhai</i>, I. L. R. 31 Bom. 590, distinguished. If an order of Court, which has been erroneously made or irregularly obtained, is subsequently revoked, the position of the party is the same as if the order had never been made. <i>In re Newman</i>, [1899] 2 Q. B. 587, followed. 'Necessaries' include articles fit to maintain the particular person in the state, degree and station in life in which he is. <i>Peters v. Fleming</i>, 6 M. & W. 42; 55 R. 495, followed. <i>Ryder v. Woombwell</i>, L. R. 3 Exch. 90; 4 Exch. 32, and <i>Walter v. Everard</i> [1891] 2 Q. B. 369, referred to. 'Necessaries' must be determined with reference to the fortune and circumstances of the particular infant. Wedding presents for the bride may be 'necessaries.' <i>Jenner v. Walker</i>, 19 L. J., N. S., 398, <i>Juggessur Sircar v. Nilambur Biswas</i>, 3 W. R. 217, and <i>Makundi v. Saratsukh</i>, I. L. R. 6 All. 417, referred to. Though a particular article furnished may correspond in quality and price with the infant's means, yet if it should turn out that the infant</p>		<p>was already plentifully supplied with the thing purchased, it does not fall within the description of 'necessaries' in that particular case. <i>Johnstone v. Marks</i>, 19 Q. B. D. 569, followed. Infant can always show that he was already plentifully supplied with similar goods, and it is immaterial whether the seller knew it or not. <i>Barnes v. Toye</i>, 13 Q. B. D. 410, and <i>Ford v. Fothergill</i>, 1 Peake 301; 3 R. R. 695, followed. It is incumbent upon one who sells goods to an infant to enquire into his circumstances so as to determine not only whether the thing sold is such an article as an infant of the station in life of the purchasers would require, but whether in the particular case the purchaser had need for it, for if the infant did not require it, the seller cannot recover it. <i>Johnson v. Lynes</i>, 6 Watts & Sergeant 80, relied on. The question as to what are 'necessaries' is a mixed question of fact and law. <i>Peters v. Fleming</i>, 6 M. & W. 42, <i>Maddox v. Miller</i>, 1 M. & S. 738; 14 R. R. 565, and <i>Wharton v. Mackenzie</i>, 5 Q. B. 606; 64 R. R. 584, referred to. The mere fact that an infant has a father, mother or guardian, does not prevent his being bound to pay for what was actually necessary for him when furnished, if neither his parents nor guardian did anything towards his 'care or support.' The test is whether the articles supplied were needed for the use of the infant. <i>Call v. Ward</i>, 4 Watts & Sergeant 119, followed. JAGON RAM MARWARI v. MAHADEO PRASAD SAHU (1909) I. L. R. 36 Calc. 788</p>	
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Negotiable Instrument—Forged indorsement—Holder in due course—Onus of proof—Negotiable Instruments Act (XXVI of 1881) ss. 9, 46, 58, 59. No person can claim a title to a negotiable instrument through a forged indorsement. Such an indorsement is a nullity and must be taken as if no such indorsement was on the instrument. <i>Chandra Kali Dabee v. E. P. Champian</i> , I. L. R. 32 Calc. 799, not followed. <i>Hunsraj Purmanand v. Ruttonji Walji</i> , I. L. R. 24 Bom. 65, followed. Where a plaintiff establishes the fact that a negotiable instrument was obtained from its lawful owner by means of fraud, the onus of proving that a third party was a holder in due course lies on the defendant. <i>BANKU BEHARI SIKDAR v. SECRETARY OF STATE FOR INDIA</i> (1908) I. L. R. 34 Calc.	239
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Newspapers (Incitements to Offences) Act (VII of 1908)—*conold.*
to assassination—"Incitement," meaning of—Direct or indirect incitement—General incitement, not addressed to particular persons—Construction of offensive article. The question of the intention or knowledge of an individual may determine his criminal liability under the ordinary law of abetment by incitement by means of words, written or spoken, but under the Newspapers (Incitements to Offences) Act no question of the intention of the writer, printer or publisher arises, and no personal liability is imputed to any particular person. The order thereunder is not one against any person, but is purely restrictive and directed against the use, or intended use, of a press for the purpose of printing or publishing a newspaper containing any incitement to murder or to any offence under the Explosive Substances Act (VI of 1908) or to any act of violence. The words "any incitement" in section 3 (1) of the Newspapers Act include direct and indirect incitement, and need not be addressed to any particular person, nor expressed in violent and outrageous terms. "To incite" means "to move to action, to stir up, to stimulate, to instigate or to encourage," and a newspaper article comes within the scope of section 3 if it is, as a matter of fact, calculated, directly or indirectly, to produce that effect. *Per RYVES J.*—There can be no hard-and-fast canon as to what words or given set of words constitute "incitement." It is a question of fact in each case, and must usually depend largely on concomitant circumstances. The article must be read as a whole and, as far as possible, in the sense in which it was read by the section of the public to which it was primarily addressed, and also considered with regard to the occasion and place of publication and the class or status of persons likely to be affected by it. *GIRJA SUNDAR CHUCKERBUTTY v. EMPEROR* (1908) I. L. R. 36 Calc. ..

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Official Assignee—Sale of Insolvent's Estate—Commission on sale of mortgage property—Indian Insolvency Act (11 & 12 Vic., c. 21) ss. 19, 21, 31—Supreme Courts' Officers Act (XV of 1848) ss. 1, 2—Practice. On the application of the mortgagee, an order was made in insolvency proceedings directing the Official Assignee to sell certain immoveable properties belonging to an insolvent, but which were subject to a mortgage :— <i>Held</i> , that the Official Assignee was not entitled to charge a commission out of the insolvent's estate on the full value of the properties sold, but only on the amount coming to the insolvent's estate. <i>Held</i> , also, that although the practice of this Court for over thirty years had apparently been to allow such commission, it was contrary to the provisions of the Indian Insolvency Act (11 & 12 Vic., c. 21) and the Supreme Courts' Officers Act, 1848. <i>In re Howard Brothers (Insolvents)</i> , 13 B. L. R. App. 9, commented on. <i>In re</i> OFFICIAL ASSIGNEE'S COMMISSION (1909) I. L. R. 36 Calc. ..	990	Orissa Land Tenure : <i>See</i> HINDU LAW	590
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Opium, illegal possession of—Opium Act (I of 1878) s. 9 (c)—Possession of railway receipt for an undelivered parcel of contraband opium. The possession of a railway receipt relating to an undelivered parcel of contraband opium lying in a railway office, under circumstances showing knowledge of its contents, constitutes possession of the opium within section 9, clause (c) of the Opium Act. <i>Kashi Nath Bania v. Emperor</i> , I. L. R. 32 Calc. 557, discussed and followed. <i>ASHRAF ALI v. EMPEROR</i> (1909) I. L. R. 36 Calc. ..	1016	Partition : <i>See</i> HINDU LAW	75
		----- — <i>Estates Partition Act (Bengal VIII of 1876) s. 63, and (Bengal V of 1897) s. 2, cl. (b)—Private Partition—Partition Proceedings commenced under Act V of 1876 (B.C.) whether governed by Act V of 1897 (B.C.)—Partition by Collector, whether open to objection—Limitation Act (XV of 1877) Sch. II, Art. 14—Order Sheet, ex parte entry in—Specific Relief Act (I of 1877) s. 42—Dispossession during pendency of suit—Plaint, amendment of.</i> Where a partition proceeding commenced under s. 63 of Act VIII of 1876 (B.C.) before Act V of 1897 (B.C.) came into operation, and the Subordinate Judge decided that the suit was not maintainable under the provisions of Act V of 1897 (B.C.): <i>Held</i> , that under s. 2, cl. (b), Act V of 1897 (B.C.), where a suit had been instituted under Act VIII of 1876 (B.C.), all subsequent proceedings for partition must be carried on under Act VIII of 1876 (B.C.) as if Act V of 1897 (B.C.) had not been passed, and the question of the maintainability of the suit should have been determined with reference to the provisions not of Act V of 1897 (B.C.) but of Act VIII of 1876 (B.C.). Where an application for partition fulfilled the requirements of ss. 18 and 19 of Act VIII of 1876 (B.C.) and objection under s. 12 of Act VIII of 1876 (B.C.) was	

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disallowed by the Collector, and the order of the Collector was upheld by the Board of Revenue, and the partition was proceeded with:—*Held*, that under s. 12 of Act VIII of 1876 (B.C.) the Collector had no jurisdiction to make the partition. Where the Board of Revenue on appeal decided that the private partition set up was not established, and the Collector proceeded with the partition, and subsequently in a suit to set aside the partition by the Collector it was decided by the Subordinate Judge that the finding of the reality of the alleged partition by the Revenue Court was conclusive, and that the Civil Court had no jurisdiction to investigate the competency of the Collector to make the partition in view of s. 12 of Act VIII of 1876 (B.C.): *Held*, that the Civil Court was competent to decide the matter in controversy, and that, therefore, the suit was maintainable. Where in a partition suit commenced under Act VIII of 1876 (B.C.), the provisions of s. 25 of Act V of 1897 (B.C.) were applied, and it was decided that the suit was barred: *Held*, that provisions of s. 25 of Act V of 1897 (B.C.) were not applicable but the corresponding section of Act VIII of 1876 (B.C.), and that the suit was not barred under that section or under Art. 14 of the Limitation Act (XV of 1877). *Laloo Singh v. Purna Chander Benerjee*, I. L. R. 24 Calc. 149, *Raj Chandra Roy v. Faizuddin Hossein*, I. L. R. 32 Calc. 716, *Narendra Lal Khan v. Jogi Hari*, I. L. R. 32 Calc. 1107, and *Alimuddin v. Ishan Chandra Dey*, I. L. R. 33 Calc. 693, referred to. *Parbati Nath Dutt v. Rajmohun Dutt*, I. L. R. 29 Calc. 367, distinguished. An *ex parte* entry in the order-sheet of the Collector is no evidence of possession of a party. *Mir Tapurah Hossein v. Gopi Narayan*, 7 C. L. J. 251, referred to. An amendment of the plaint would be allowed when the plaintiff had been dispossessed during the pendency of the suit,

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so as to make it appropriate to a suit for possession. *Jugdeo Singh v. Habibullah Khan*, 6 C. L. J. 612, followed. *ANANDA KISHORE CHOWDHRY v. DALJE THAKURAIN* (1909) I. L. R. 36 Calc.

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— *Appeal—Preliminary Decree—Final Decree—Appeal against preliminary decree after final decree, legality of—Civil Procedure Code (Act XIV of 1882) s. 562—Practice.* Where in a partition suit a final decree had been made and an appeal was preferred against the preliminary decree only:—*Held*, that it was not open to the appellant to challenge the correctness of the preliminary decree without preferring an appeal against the final decree. *Madhu Suman Sen v. Kamini Kanta Sen*, I. L. R. 32 Calc. 1023, referred to. *Baikunta Nath Dey v. Nawab Salimulla Bahadur*, 6 C. L. J. 547, followed. *Uman Kunwari v. Jarbandhan*, I. L. R. 30 All. 479, *Sheo Nath Singh v. Ram Din Singh*, I. L. R. 18 All. 19, not followed. *MACKENZIE v. NARSINGH SAHAI* (1909) I. L. R. 36 Calc.

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Possession, suit for : See ESTOPPEL . . 920	Principal and Surety —Breach of Contract—Variance in terms of Contract—Surety, liability of—Contract Act (IX of 1872) s. 133. A entered into a surety bond on behalf of B for the due performance of the duties of B as a <i>tehsildar</i> under the terms of a contract, the security being limited to a fixed amount. One of the terms was that B should render account of his <i>tehsil</i> every year. B did not render account for the year 1308, and was allowed to realize rents for 1309 in breach of the terms of the contract. In a suit for account against B and his surety :—Held, that there was no variation in the contract between
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Practice : See APPEAL, ADMISSION OF . . 385	
—————: See COMMISSION 566	
—————: See DEPOSITION OF WITNESSES, READING OVER : 955	
—————: Criminal motion to High Court without previous application to lower Court with concurrent jurisdiction—Criminal Procedure Code (Act V of 1898) ss. 435 to 439. The High Court will not entertain an application for revision in cases where the Sessions	

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Principal and Surety—<i>concl'd.</i>		Railway Company, liability of—<i>concl'd.</i>	
the parties, as contemplated by s. 133 of the Contract Act, and that the surety was liable. <i>KANAI PRASAD BOSE v. JOTINDRA KUMAR ROY CHOWDHRY</i> (1909) I. L. R. 36 Calc.	626	booked as his "luggage" a package containing merchandise. The package was lost and consequently not delivered at the end of his journey. He, thereupon, sued the Railway Company for damages caused by its loss:— <i>Held</i> , that the case was governed by s. 72 of the Indian Railways Act (IX of 1890) and the section of the Contract Act referred to therein; and that the Railway Company was liable for the loss of the package. <i>VELAYAT HOSSEIN v. BENGAL AND NORTH-WESTERN RAILWAY CO.</i> (1909) I. L. R. 36 Calc.	819
Private Partition : See PARTITION	726	Railway Receipt, possession of : See OPIUM, ILLEGAL POSSESSION OF	1016
Privilege : See DEFAMATION	375	Rash or Negligent Act : See DEATH BY RASH OR NEGLIGENT ACT	302
————: See LIBEL	883	Rateable Distribution : See CIVIL PROCEDURE CODE (ACT XIV OF 1882) ss. 244, 295, 622	130
————: See LIBEL	907	Reasonable and probable Cause : See MALICIOUS PROSECUTION	27
Privileged Occasion : See LIBEL	907	Receiver—Appeal—Civil Procedure Code (Act XIV of 1882), ss. 503, cl. (b) ; 588, cl. (24)—Stranger in possession of property in suit—Lien on property—Jurisdiction of Court when ousted—Rights of Stranger against Receiver—Possessory Lien—Possession by Receiver. Where in a mortgage suit a Receiver appointed by Court was directed to take possession of the property in custody of a person not a party to the suit: <i>Held</i> , that such an order was made under s. 503, cl. (b) of the Civil Procedure Code (Act XIV of 1882), and was appealable under s. 588, cl. (24). Where a stranger to a suit claims under a title paramount to that of the parties, the jurisdiction of the Court is not ousted by the mere assertion of the existence of the circumstance but upon proof of the actual existence of such circumstance and upon judicial investigation. <i>Budh Singh Dhudhuria v. Niradbaran Roy</i> , 2 C. I. J. 431, and <i>Mahomed Mehdi Galistana v. Zoharra Begum</i> , I. L. R. 17 Calc. 285, followed. <i>Hurree Pershad Malee v. Koonjo Behary Shaha</i> (1862) Marshall 99, <i>Chunder Koomar Mundul v. Bakur Ali Khan</i> ,	
Privy Council Appeal—Security for Costs of Respondents—Government Promissory Notes at their nominal value, whether acceptable—High Court Rules (Appellate Side), Part II, Chapter IV, Rule XX—Practice. A deposit of Government Securities amounting to Rs. 4,000, at their nominal value, comes within the express words of Rule XX, Part II, Chapter IV of the High Court Rules, requiring the appellant to deposit Government Securities "to the extent of Rs. 4,000" for costs of the respondent in an appeal to His Majesty in Council. <i>GOLAP KUMARI v. GANESH CHANDRA MITRA</i> (1909) I. L. R. 36 Calc.	653		
Probate, application for, by executors : See RIGHT TO SUE, SURVIVAL OF	799		
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Railway Company, liability of—Passenger's Luggage—Merchandise booked as "Luggage," loss of—Railways Act (IX of 1890) ss. 47, 72—General Rules of Railway Companies—Damages, suit for. A passenger took a journey on a railway and			

Receiver—*concl.*

9 W. R. 598, *Shashti Charan Chatterjee v. Tarak Chandra Chatterjee*, 8 B. L. R. 315; 15 W. R. 9 (F.B.), *Mahomed Wahiduddin v. Hakimian*, 1 L. R. 25 Cal. 757, and *Mayor of London v. Cox*, L. R. 2 H. L. 239, referred to. The possessory lien of an agent attaches only upon goods or chattels in respect of which the principal has, as against a third person, the right or power to create a lien; such lien is confined to the rights of the principal in the goods or chattels at the time when it attaches, and is subject to all the rights and equities of third persons available against the principal at that time. *Attorney-General v. Freeman*, 11 M. & W. 694, *Attorney-General v. Walmsley*, 12 M. & W. 179, *Manningford v. Taleman*, 1 Coll. 670; 66 R. R. 239, *In re Llewellyn* [1891] 3 Ch. 145, and *Peat v. Clayton* [1906] 1 Ch. 659, referred to. *HUDSON v. MORGAN* (1909) 1 L. R. 36 Cal. . .

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—Lease—Summary jurisdiction—Remedy—Interest—Receiver's accounts—Practice. Where a lease had been already granted by a Receiver acting under an order of Court, and possession of the property had been given to the lessee, and subsequently certain parties applied to the Court for a declaration that the lease was invalid, and for certain other reliefs against the Receiver and the lessee. *Held*, that no summary order could be passed to set aside the lease. The proper remedy would be by suit against the Receiver, and also against the lessee, if it was alleged that the lease was obtained by collusion. *Surendro Keshub Roy v. Doorga Soondery Dossee*, 1 L. R. 15 Cal. 253, distinguished. *Held*, further, that on this application no order could be made against the lessee for interest on arrears of rent, nor could any order be passed against the Receiver in respect of the same, as this was a matter touching the Receiver's accounts. *KRISTA CHANDRA GHOSE v. KRISTA SAKHA GHOSE* (1908) 1 L. R. 36 Cal. . .

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Receiver, withdrawal of money by :—

See TRANSFER OF PROPERTY ACT (IV OF 1882) ss. 83, 84 . . . 840

Receiver's Accounts : See RECEIVER . . . 52

Reference to High Court—Acquit-

tal by Jury—Powers of the High Court—"Opinion" of Jury in cases of divided verdict—Consideration of entire evidence—Verdict not unreasonable on the face of the charge—Pardon—Omission to state reasons when facts leading to grant of pardon appear on the record—Criminal Procedure Code (Act V of 1898) ss. 307, 337 (4). Where the facts which led up to the tender of pardon appear on the record, the omission by the Magistrate granting it to state his reasons for so doing is not an illegality nor even an irregularity which vitiates the subsequent proceedings. *Deputy Legal Remembrancer v. Banu Singh*, 5 C. L. J. 224, followed. The High Court cannot throw out a reference under s. 307 of the Criminal Procedure Code merely because it might be argued, upon the face of the charge to the Jury, that the verdict was not altogether an unreasonable one, but it must consider the entire evidence and arrive at its own judgment after giving due weight to the opinions of the Judge and Jury. *Emperor v. Lyall*, 1 L. R. 29 Cal. 128, and *Emperor v. Abdul Rahman*, 9 C. L. J. 432, followed. *King-Emperor v. Chidghan Gosain*, 7 C. W. N. 135, *Emperor v. Anaruddin Biswas*, unreported, *King-Emperor v. Anes*, unreported, and *King-Emperor v. Prasanna Kumar Ganguli*, unreported, referred to. *Emperor v. Chirkua*, 2 All. L. J. 475, dissented from. The opinion of the Jury is their conclusion and not the reasons therefor, and in the case of divided verdicts the opinion of the minority must also be considered by the Court. The Legislature in directing the High Court to duly weigh the opinion of the Jury gives an implied authority for the taking of their reasons for the verdict, and the Judge will do well before making the reference to invite such reasons, not for the purpose of

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Reference to High Court— <i>concl'd.</i>	
deciding whether it should be made, but for consideration by the High Court, after having made up his mind to refer the case and after telling the Jury of his intention to do so. But the omission to take or record the reasons does not warrant the High Court in declining to go into the evidence. <i>Emperor v. Chellan</i> , I. L. R. 29 Mad. 91, referred to. <i>EMPEROR v. ANNANDA CHARAN THAKUR</i> (1909) I. L. R. 36 Calc. . .	629
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Regulation XI of 1793 : See HINDU LAW	590
Regulation X of 1800 : See HINDU LAW	590
Regulation XII of 1805, s. 36 : See HINDU LAW	590
Regulation IV of 1814 : See SALT-PETRE	268
Regulation III of 1818, deportation under : See LIBEL	883
Regulation III of 1891— <i>Jhum cultivation in Sylhet—Regulation extinguishing proprietary rights and giving compensation—Onus of proof as to applicability of Regulation—Question of fact, concurrent decisions of Courts in India on—Proof of reason for taking profits of jhum lands into account in estimating income of settled estate—Long possession and enjoyment as proof of title.</i> Regulation III of 1891 (issued under Statute 33 Vict. C. 3) recited in the preamble that "the officers, who effected the permanent settlement of certain estates in Sylhet, included for the purposes of assessment among the assets of those estates, under the designation of <i>jhum</i> , the income then derived by the proprietors of those estates from shifting cultivation carried on by them or their dependents beyond the limits of those estates; that the cultivation shifted from year to year over immense and altogether undefined areas, and the tracts of land, over which they extended, were not specified at the time of the settlement and in consequence of this rights of various, and in some cases vague, de-	

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Regulation III of 1891— <i>cont'd.</i>	
scriptions are from time to time asserted by the said proprietors over such areas; that it is thus impossible for any person to obtain a safe and clear title to land in those areas, and the extension of cultivation is in consequence impeded, and that it is expedient that the rights, if any, corresponding to the said <i>jhum</i> assets should be commuted." Section 2 enacted that all such rights should be deemed to have been extinguished; and by s. 3 it was declared that all proprietors of such estates should be entitled to compensation. The Government extended the above Regulation to certain areas under <i>jhum</i> cultivation belonging to the appellants, who and their predecessors in title had held them since 1837. In a suit brought against the Secretary of State for India in Council by the appellants, they alleged that the land in dispute appertained to taluks, which had been settled with their predecessors in title at the time of the permanent settlement, and prayed for a declaration that it did not come within the operation of Regulation III of 1891. <i>Held</i> , that as the Government were claiming to apply to lands, which had undoubtedly been long in the enjoyment of the predecessors in title of the appellants, a Regulation, which would have the effect of confiscating proprietary rights and giving compensation in exchange, it lay upon the Government to show that the facts of the case were such as to bring it within the operation of the Regulation. <i>Held</i> , also, that the question whether the <i>jhum</i> lands lay within or without the limits of the settled estates was not a question of fact, on which the concurrent decisions of the Courts in India could be accepted as final. In a sense it was one of fact, but at every point in the process of reasoning considerations of law had to be regarded. It was not disputed that the taluks held by the appellants had been settled with their predecessors in title at the per-	

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Regulation III of 1891—<i>concl'd.</i>		Revenue-Court Decree : See CIVIL PROCEDURE CODE (ACT XIV OF 1882)	
manent settlement, and that the profits of the <i>ghum</i> lands in dispute had then been brought into account in estimating the assets of the taluks, but the parties differed as to the reason why they had been so taken into account. <i>Held</i> , that on the documentary evidence in the case there was, after such a lapse of time, not sufficient to show whether they had been so taken into account, because the <i>ghum</i> lands formed part of the settled estate as contended for by the appellants, or because they had been treated as assets accruing to the owners of the settled estate, but derived from land lying outside it as the Government contended. No confident conclusion, therefore, could be drawn from the evidence as to whether the disputed land was part of the settled estate or was beyond its limits. <i>Held</i> , however, that the possession and enjoyment of the disputed land by the appellants and their predecessors in title taken together with the instances in evidence in 1842, 1843, and 1855, in which it had been confirmed by the Government, was sufficient to prove their title. Since the last named date such possession and enjoyment had been continuous. HAIDER KHAN v. SECRETARY OF STATE FOR INDIA IN COUNCIL (1908) I L. R. 36 Calc.	1	s. 492	252
Re-indorsement : See BILL OF EXCHANGE	291	Reversioner, power of : See HINDU LAW	780
Relationship and Notoriety essential, proof of publicity of : See BURMESE LAW	978	Review by High Court of Valuation of land by Special Judge : See COMPENSATION	967
Remand to Custody : See BAIL	166, 174	Revision—High Court, revisional jurisdiction over immovable property—Power to interfere with orders directing restoration of possession of immovable property—Duty of Magistrate to pass orders under ss. 517 and 522 in favour of a party forcibly dispossessed—Criminal Procedure Code (Act V of 1898) ss. 423 (1) (d), 439, 517, and 522. Under s. 423 (1) (d) of the Criminal Procedure Code the High Court has power, as a Court of Revision, to interfere with an order passed by a Magistrate under s. 522 of the Code. <i>Manki v. Bhagwanti</i>, I. L. R. 27 All. 415, followed. <i>Ram Chandra Mistry v. Nobin Mirdha</i>, I. L. R. 25 Calc. 630, referred to. Where a party was found to have been assaulted and dispossessed of a bungalow and its contents by the opposite party, who was, in consequence, convicted under s. 323 of the Penal Code. <i>Held</i>, that it was the duty of the Magistrate to have passed orders under ss. 522 and 517 directing restoration of the bungalow and its contents to the party thus forcibly dispossessed. AHMED ALI v. KEENOO KHAN (1908) I. L. R. 36 Calc.	45
Remedy : See RECEIVER	52	Rivision, Criminal : See PRACTICE	643
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Rent, payment of, for a number of years : See LEASE	604	Right of Private Defence : See RIOTING	296
Res Judicata : See JURISDICTION	193	Right of Private Defence : See RIOTING	827, 865
Restraint of Trade : See CONTRACT	354	Right to Possession : See SALE	336
Retainer (Attorney's), how revocable : See ATTORNEY AND CLIENT	609	Right to sue, survival of—Abatement of suit—Civil Procedure Code (Act V of 1908) Order XXII, Rule 1—Application for Probate by Executor—Death of Executor—	
Retransfer : See JURISDICTION	193		

Right to sue, survival of—*concl'd.*

Application for Letters of Administration in same suit, by Legal Representative of Executor. On an application by a sole executor for grant of probate, a *caveat* was entered, and the matter was set down as a contentious cause. Pending the hearing, the executor died. Thereupon his widow and legal representative applied to have her name substituted for his, and to have the petition for probate amended by substituting a prayer for letters of administration with copy of the will annexed, in place of the prayer for probate. *Held*, that the application must be refused, as the right to sue had not survived, and the suit had abated. *SARAT CHANDRA BANERJEE v. NANI MOHAN BANERJEE* (1909) I. L. R. 36 Cal.

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Rioting—Common object established different from that laid in the charge—Common object not to enforce, but to maintain the actual enjoyment of a right—Right of private defence—Excess of that right—Penal Code (Act XLV of 1860) ss. 103 (4), 141 (4), 147, 323 and 324. It is not a general proposition of law that a conviction under s. 147 of the Penal Code cannot be supported whenever the common object, as stated in the charge, is not precisely made out. The question in each case is whether the common object established agrees in essential particulars with that laid in the charge. Where the common object set out in the charge was to assault the complainant and his party, who were cutting the paddy or their land, and thereby to forcibly oust them, but the common object established by the facts found by the Sessions Judge was to maintain possession of the land by the accused :—*Held*, that the common object in the charge had not been substantially made out, and that the conviction under s. 147 of the Penal Code was, therefore, bad. Where the accused, who were found to be in possession of the disputed land, went upon it in a large body armed with *lathis*, prepared in anticipa-

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tion of a fight, and where reaping the paddy grown by them, when the complainant's party came up and attempted to cut the same, whereupon a fight ensued, and one man was seriously wounded and died subsequently :—*Held*, that on the facts established, the common object was not to enforce a right or supposed right but to maintain undisturbed the actual enjoyment of a right, and that the assembly was not, therefore, unlawful under s. 141 (4). Where one accused, under the circumstances, caused simple hurt, and another, a fracture of the skull which ended fatally :—*Held*, that the former was within his right of private defence, but that the latter had not proved facts bringing the case under s. 103 (4). *SILAJIT MAHTO v. EMPEROR*, (1909) I. L. R. 36 Cal. . . .

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—*Right of private defence—Use of excessive violence by some members of the assembly—Responsibility of other members continuing in it, and aiding and abetting—Indian Penal Code (Act XLV of 1860) ss. 99, 147, 148 and 326.* If the accused are justified in resisting the theft of the crops, they cannot be considered as members of an unlawful assembly, with the common object to assert a right to the disputed land and crops, because some members thereof may have exceeded the right of private defence; but if some of the members continue in it, after the others have exceeded the right by the infliction of unnecessary violence, and aid and abet the latter, they also must be considered as having exceeded the right. *In the matter of Kalee Mundle*, 10 C. L. R. 278, referred to. Where the accused, three of whom were armed with a sword, a *garasa* (scythe) and a *lobanda* (iron-shod stick) respectively, and the rest with *lathis*, went in a large body to a certain disputed land, where the labourers of the opposite party were reaping some *musouri* crop and attacked them, fatally wounding one and severely injuring another, it was *held* that the accused who ordered the

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attack, and those who used the sword, *garasa* and *lobanda* had exceeded the right of private defence, and so also the others, who continued in the unlawful assembly thereafter and aided and abetted the former. *BAIJNATH DHANUK v. EMPEROR* (1908) I. L. R. 36 Calc. . . . 296

—*Right of Private Defence—Protection of Zemindar's right to property—Excessive hurt by one member of an unlawful assembly—Criminal liability of the other members thereof—Penal Code (Act XLV of 1860) ss. 147, 326.*

Where the tenants were found to have held their lands on the *batai* system, under which harvested crops should be taken to the village *khalihan*, but it appeared that they went in a large body armed with *lathis* with the avowed intention of removing them to their own houses, and were making up the crops already cut into bundles, whereupon the zemindars' watchmen remonstrated and a number of their *amlas* went to the spot armed with *lathis* and swords and a fight took place, owing to the interference of the leader of the tenants, in the course of which some of the tenants received slight incised wounds and one of them a severe one inflicted by one of the accused, and where it further appeared that the zemindars' people had, four days before the date of the occurrence, sent an urgent appeal to the police for protection against a serious breach of the peace which seemed imminent:—*Held*, that, inasmuch as the common object of the accused was to protect the zemindars' right over the crops, and there was no specific finding by the Sessions Judge that their intention was to use more force than was necessary or that they had in fact used excessive force, they acted in the exercise of the right of private defence and were not guilty of rioting. *Held*, also, that, as there was nothing to show that the grievous hurt caused by one of the accused was not his

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own individual act, the others were not guilty under ss. 326 of the Penal Code. Each case of this kind must be decided on its own particular facts. *Baijnath Dhanuk v. Emperor*, I. L. R. 36 Calc. 296, distinguished. *RAM KHELAWAN SINGH v. EMPEROR* (1909) I. L. R. 36 Calc. . . . 827

—*Common object of unlawful assembly—Necessity of express finding on the point by the lower Courts in their judgments—Criminal Procedure Code (Act V of 1898) ss. 367 and 424, Indian Penal Code (Act XLV of 1860) ss. 141 and 147.* Where the common object of an unlawful assembly was stated in the charge to be to enforce a right or supposed right, and there was no dispute as to the common object in the lower Courts, which did not, therefore, discuss the question or come to any express finding in so many words on the point it was held that they had impliedly found the common object, of the assembly to be the same as stated in the charge, and that the accused had been in no way prejudiced. *Sabir v. Queen-Empress*, I. L. R. 22 Calc. 276, *Poresh Nath Sircar v. Emperor*, I. L. R. 33 Calc. 295, distinguished. *DASARATHI MAHAPATRA v. RAGHU SAHU* (1908) I. L. R. 36 Calc. . . 158

Risk, exception from : See MARINE INSURANCE 516

Road cess, property sold for arrears of : See HINDU LAW—LEGAL NECESSITY 753

Sale : See EXECUTION 422

—*application to set aside : See SALE IN EXECUTION* 654

—*by Court under mortgage decree : See SALE* 323, 336

—*Decree—Execution of decree—Sale by Court under decree on a mortgage—Misrepresentation by auctioneer, an officer of Court—Contract Act (IX of 1872) ss. 18 and 19, Exception—Bid made under misapprehension caused by such misrepresentation—Suit to set aside sale—Purchaser of worthless equity of redemption—Reference of the matter to the Court—*

GENERAL INDEX.

Sale—*contd.*

Civil Procedure Code (Act XIV of 1882), s. 306. A sale of mortgaged property in execution of a decree was conducted by two officers of the Court, one a chief clerk and officiating bailiff and the other his deputy, the assistant bailiff, who acted as auctioneer. The latter read a proclamation of sale in English, a language not understood by the native bidders present, which stated that only the interest of the judgment-debtor was for sale. Being asked by a native present to explain the terms of the proclamation, the auctioneer made a statement in Hindustani to the effect that "there are four mortgages; on this account there is a sale by order of the Court, the title-deeds can be seen at the Registrar's office," from which the plaintiff, who casually attended the sale, was led to believe that the property was being sold at the instance of the mortgagees and free of incumbrances, and he bid for the property which was knocked down to him for a sum nearly equal to its full value. After the sale he discovered that it had been sold subject to mortgages amounting to more than its value, and that he was the purchaser of the equity of redemption, which was worthless. In a suit to set aside the sale on the ground that he bid for the property under a misapprehension caused by the misrepresentation made by the auctioneer, the Appellate Court in India held that there was misrepresentation under s. 18 of the Contract Act (IX of 1872), but that the case fell within the exception in s. 19, as the plaintiff might with ordinary diligence have discovered the truth, and dismissed the suit. *Held*, by the Judicial Committee, that in sales under the direction of the Court it was incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers. Here the plaintiff had been

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Sale—*contd.*

misled by the accredited agents of the Court which could not under such circumstances enforce against him so illusory and unconscientious a bargain as the sale to the plaintiff was shown to be. *Held*, also, that the plaintiff had no means of discovering the truth, while the sale was going on, and he was perfectly justified in relying on the statement as to the property which was being sold made by the auctioneer. The exception in s. 19 of the Contract Act had no application to the case. *Held*, further, that the Chief Clerk was right in referring the matter to the Court, and in not proceeding under s. 306 of the Civil Procedure Code. *KALA MEA v. HARPERINK* (1908) 1 L. R. 36 Calc

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—Decree—Execution of decree—Sale under decree on mortgage—Subsequent appeal from mortgage decree when Appellate Court altered decree by increasing the amount and extending time for payment by mortgagors—Effect of appellate decree on the sale—Right to possession—Application by mortgagor for restoration to possession—Limitation—*Civil Procedure Code (Act XIV of 1882), ss. 244 and 311*—Former order giving possession to mortgagees. The appellants, who were mortgagees, on 20th December 1900, obtained in a suit on their mortgage in the Court of a Subordinate Judge an ordinary decree for sale of the mortgaged property, and, pending an appeal by the appellants on the ground that they were entitled to a larger amount than had been allowed them by the decree, the mortgaged property was sold on the application of, and purchased by, the appellants, and they were put into possession under an order of the High Court, dated 18th April 1904. On the appeal from the decree of the Subordinate Judge, the High Court, on 27th January 1904, made a decree for sale conditional on the payment by the respondents, the mortgagors, of an increased amount within six months from the date

Sale—concl'd.

of the appellate decree. The respondents, who had already unsuccessfully taken objections under ss. 311 and 244 of the Civil Procedure Code to the sale being confirmed, then made an application under s. 244 for restoration to possession on the ground that the High Court had by its decree on appeal so modified the decree of the Subordinate Judge as to render the sale under it illegal. The Subordinate Judge held that the application was not one within the purview of s. 244; that it was barred by limitation; and that the decree of the High Court did not invalidate the sale, and dismissed the application. The High Court on appeal, holding that the application was rightly made under s. 244, and was not barred, and that the sale under a decree, which was subsequently substantially altered on appeal, could not be otherwise than bad, reversed the Subordinate Judge's decree, and directed that possession should be restored to the respondents, but refused to disturb the possession of the appellants pending the appeal to His Majesty in Council. *Held*, by the Judicial Committee, that the decree of the High Court was inconsistent with its order of 18th April 1904 giving the appellants possession, against which no appeal had been brought, and which could not be treated as null and void; that to allow the respondents to take advantage of the error in the decree of 27th January 1904 would entail expense and delay; that the merits of the case were not with them, and they had not offered to redeem the property. Their Lordships therefore allowed the appeal, and restored the decree of the Subordinate Judge. *RAM GOLAM SABU v. BARSATI SINGH* (1908) I. L. R. 36 Calc. 336

Sale in Execution—Application to set aside sale—Limitation—Fraud—Onus of proof—What to prove exactly—Limitation Act (XV of 1877) s. 18. When a suit or application is, on the face of it, barred by limitation, it is for the

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Sale in Execution—concl'd.

plaintiff or applicant to satisfy the Court of circumstances which would prevent the statute from having its ordinary effect. In the case of an application for setting aside a sale in execution, where the petitioner relied upon the provisions of s. 18 of the Limitation Act, 1877:—*Held*, that it was incumbent upon him to show that not only had he no knowledge of the sale until some date within three years of his application, but that he was kept from that knowledge in the manner and by the act of the persons specified in that section. *PURNA CHANDRA MANDAL v. ANUKUL BISWAS* (1909) I. L. R. 36 Calc. 654

Sale of Goods by Description : See
CONTRACT 736

Sale of Immoveable Property : See
ESTOPPEL 920

Sale of Insolvents' Estate : See OFFICIAL ASSIGNEE 990

Saltpetre—Monopoly—Manufacture—Regulation IV of 1814—Effect on the monopoly. The abolition of the monopoly of the East India Company to the manufacture of saltpetre by Regulation IV of 1814 was not intended to affect the right of a purchaser of the monopoly to realize his dues either in the shape of royalty from the manufacturers or himself to manufacture saltpetre, to the exclusion of all other persons or proprietors of land in the *nimaksayar mahal*. The right to grant license and realise royalty would not be inconsistent with the abolition of a monopoly. *GOLAB CHAND v. JANKI KOER* (1908) I. L. R. 36 Calc. 267

Sambandha-nirnaya Patra : See WILL, VALIDITY OF 149

Sanction for Prosecution, terms of—Perjury, assignment of—Charges relating to several false statements in the same deposition—Misjoinder—Reading deposition to witness in the presence of a pleader for one of several accused—Interpreter, omission to administer Oath to—Admissibility of Deposition and proof of Statement of the Witness on a subsequent trial for Perjury

Sanction for Prosecution, terms of—*contd.*

—*Criminal Procedure Code (Act V of 1898) ss. 195 cl. (4), 234, 360 cl. (1) and 537—Penal Code (Act XLV of 1860) s. 193—Oaths Act (X of 1873) ss. 5 (b), 13.* Although s. 195, cl. (4), does not in express terms render an assignment of perjury necessary, the application for sanction and the order granting it, in respect of statements contained in a lengthy deposition, should specify the particular statements alleged to be false, but the omission to do so is a defect cured by s. 537, unless a failure of justice has in fact been established. Where the alleged false statements were not set out in the order of sanction but were specified in the application for it and also in the charges subsequently framed:—*Held*, that the accused was not prejudiced by the omission in the sanction. *Bahvant Singh v. Umed Singh*, I. L. R. 18 All. 203, *Queen v. Kartick Chunder Haldar*, 9 W. R. Cr. 58, *Queen v. Gobind Chunder Ghose*, 10 W. R. Cr. 41, *Queen v. Boodhun Ahir*, 17 W. R. Cr. 32, *In re Jivan Ambaidas* I. L. R. 19 Bom. 362, *Goberdhone Chowkidar v. Habibullah*, 3 C. W. N. 35, and *Queen v. Soonder Mohoree*, 9 W. R. Cr. 25, referred to. The making of any number of false statements in the same deposition is one aggregate case of giving false evidence, and such charges cannot be multiplied according to the number of false statements contained in a deposition. *Mad. H. C. Pro., 1st May 1871*, 6 *Mad. H. C.* xxvii, followed. Section 360 (1) is sufficiently complied with if the deposition of a witness is read over to him in the presence of a pleader for one out of twenty-seven accused. A deposition so read over is admissible against the witness on his trial subsequently for giving false evidence. *Kamatchinathan Chetty v. Emperor*, I. L. R. 28 *Mad.* 308, and *Mohendra Nath Misser v. Emperor*, 12 C. W. N. 846, distinguished. The omission to administer an oath to an inter-

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preter, under s. 5 (d) of the Oaths Act (X of 1873), does not, by reason of s. 13, render the evidence of a witness whose evidence was interpreted by him inadmissible against the latter on his subsequent trial for giving false evidence. The only effect of the omission is to make it incumbent on the prosecution to prove the accuracy of the translation. *Queen v. Ramsodoy Chuckerbutty*, 20 W. R. Cr. 19, approved. *RAKHAI CHANDRA LAHA v. EMPEROR* (1909) I. L. R. 36 *Calc.* 808

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till the paddy was ripe when they were to give notice to the factory people who would reap it:— <i>Held</i> , that by cutting the crops themselves and disposing of the same, the accused were guilty of theft if not of criminal breach of trust. <i>Jugdoun Sinha v. Queen-Empress I. L. R. 23 Calc. 372, and Reg. v. Girdhar Dharmdas, 6 Bom. H. C. 33, distinguished. Queen-Empress v. Bhagn, Ratanlal's Unrep. Cr. C. 928, followed. DURGA TEWARI v. EMPEROR (1909) I. L. R. 36 Calc.</i>	758
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inasmuch as it was common ground that there was a gift to the daughter, it must be presumed to have been an absolute gift, and the appellant was entitled as her heir. *Held*, by the Judicial Committee, that the High Court was right in reversing that decision, because, if the gift of the village were absolute in favour of the daughter, she had, on the evidence in the case, by the subsequent deed of 1883, agreed it should at her death revert to her father and his heirs. *SHAM SHIVENDAR SAHI v. JANKI KOER* (1908) I. L. R. 36 Calc. 311

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bond—Interest previously paid by debtor whether to be taken into account in making decree. On 27th July 1885 a simple mortgage bond for Rs. 34,000 providing for interest at 18 per cent. per annum and on default in payment compound interest at the same rate was executed by a debtor, now represented by the respondents in favour of one of a firm of money-lenders, the transaction being admittedly governed by s. 6 of the Sonthal Pergunnahs Settlement Regulation III of 1872, as amended by Regulation V of 1893. On 27th October 1890, interest to the amount of Rs. 23,403-15-6 had at various times been paid and that was all that was due for interest up to that date. Nothing more was paid until, on 17th August 1895, the mortgagor being anxious to redeem the mortgage tendered to the mortgagee, in full discharge of the bond, the sum of Rs. 44,596-0-6, a sum fixed, as amounting together with the interest already paid, to Rs. 68,000, which by s. 6 of Regulation III of 1872, as amended by s. 24 of Regulation V of 1893, was the full amount (being double the principal) which the mortgagor considered could be recovered from him on the bond. On tendering that amount the mortgagor demanded the return of the bond, but the mortgagee, though willing to give a receipt for the money, could not give him the bond, and the mortgagor deposited the money in Court under the provisions of s. 83 of the Transfer of Property Act, that is, in full discharge of the bond. Notice of the deposit was sent to the mortgagee, but the money was not withdrawn until 23rd September 1896, when a Receiver appointed in a partnership suit between the members of the mortgagee's firm succeeded in withdrawing it by some means not disclosed, and without the provisions of the Transfer of Property Act for such withdrawals being followed. On 7th

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February 1900 the mortgagee and his partner brought a suit on the bond for Rs. 33,698-9, in which they credited the amount of Rs. 44,596-0-6 as having been paid in part satisfaction of the bond on the day when it was drawn out, and charged interest and compound interest at 12 per cent. on the entire sum (Rs. 22,559-5) shown to be due on that date. The pleas in defence were s. 6 of Regulation III of 1872 as limiting the amount of interest recoverable, and the deposit under s. 83 of the Transfer of Property Act as being a full discharge of the bond. The High Court, affirming the decree of the Subordinate Judge, held on the construction of the Regulations that the plaintiffs having received the principal and a sum for interest equal to the principal there was nothing more due and dismissed the suit. *Held*, by the Judicial Committee, that in the absence of anything to show that he had any greater power or authority to withdraw the money than the plaintiffs themselves had, the Receiver must be taken to have withdrawn it subject to the conditions prescribed by s. 83 of the Transfer of Property Act, that is, in full discharge of the bond. The plaintiffs were bound by the acts of their agent and could not rely upon the Receiver's default in omitting to perform any of the necessary conditions, in order to escape from the consequences which would of necessity have followed the withdrawal if everything prescribed by the Act had been rightly done. **RAM CHANDRA MAHWARI v. KESHORATI KUMARI (1909) I. L. R. 36 Calc.** .. 840

— s. 93—*Right to redeem, after the time allowed—Court accepting money before the order absolute—Such acceptance, effect of.* A person, who does not deposit the redemption money within the time allowed, can redeem afterwards, before

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Trespass—Bona fides—Search for arms by Magistrate, whether executive or judicial act—Protection of Judicial Officers Act (XVIII of 1850) s. 1—Statutory powers of Executive Officers, how to be exercised—Indian Arms Act (XI of 1878) s. 25—Provision "having first recorded grounds of his belief," whether mandatory or directory—Criminal Procedure Code (Act V of 1898), ss. 94, 96, 105, 106, 165—Search-warrant—Magistrate as "Court"—Search by police officer—Police Act (V of 1861) s. 4—Powers of District Magistrate—Letters Patent of 1865, s. 20—Extraordinary Original Civil Jurisdiction of High Court.

For some time previous to the 27th April 1907, there had been a considerable tension of feeling between the Hindus and Mahomedans at Jamalpur, in the District of Mymensingh. On the 27th April a Mahomedan was shot by a Hindu, and a serious conflict was narrowly averted by the Sub-divisional Officer and the District Superintendent of Police. On the arrival of the District Magistrate in Jamalpur, on the morning of the 28th April, he received reports from the two Officers of the occurrences of the 27th April, and he was also informed that the police had reason to believe that fire-arms were stored in certain cutcheries belonging to Hindu zemindars. In consequence, the District Magistrate accompanied by the District Superintendent of Police proceeded to search the cutcheries. Under the orders of the District Magistrate, the cutchery of the respondent was forcibly entered, boxes forced open and search made. On an action instituted against the District Magistrate for trespass, it was found as a fact that he had acted with perfect *bona fides*:—*Held* (Brett J.

Trespass—*cont'd*

dissenting), that according to the principles of equity, justice and good conscience, the search constituted an actionable trespass unless warranted by some Statute, and in the circumstances of the case, the search was warranted by no Statute. When Executive Officers are invested with Statutory powers of a special and drastic nature, before exercising those powers, they must strictly comply with the provisions of the Act which created them. The search being a general search for arms, was not warranted by s. 25 of the Arms Act of 1878, which required that before making the search, the Magistrate should first record the grounds of his belief, in terms of the section which was not done. The words "having first recorded the grounds of his belief" in s. 25 are mandatory. The search was not warranted by s. 105 of the Criminal Procedure Code, as, in the circumstances of the case, the Magistrate was not acting as a "Court." The search was not warranted by s. 165 of the Criminal Procedure Code: that section does not apply to a Magistrate. *Semble*: a general search for arms would be governed rather by the provisions of the Arms Act, than by the provisions of the Code of Criminal Procedure. The search must be taken to have been conducted by the Magistrate in his executive and not in his judicial capacity, and hence he was not protected by Act XVIII of 1850. *Per* Harington and Brett JJ. The issue of a search-warrant by a competent Magistrate is a judicial act. *Hope v. Evered*, I. L. R. 17 Q. B. D. 336, *Mahomed Jackariah & Co. v. Ahmed Mahomed*, I. L. R. 15 Calc. 109, and *In re Lakhmidas Narani*, 5 Bom. L. R. 520, referred to. *CLARKE v. BROJENDRA KISHORE ROY CHOWDHRY* (1909) I. L. R. 36 Calc.

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"proprietor"—*Executrix, position of—Possession—Continuing trespass—Injunction—Civil Procedure Code (Act XIV of 1882) s. 424—Notice of suit, whether necessary, where Public Officers are sued in individual capacity, or injunction sought—Jurisdiction—Immoveable property—Acquisition by executrix—Trespass under order of higher official.* Thirteen years having elapsed since the death of the testator, and the administration by the executrix of his estate, which consisted of immoveable property in Eastern Bengal and Assam, not being complete, and there being a suggestion of mal-administration, the Court of Wards of Eastern Bengal and Assam declared the infant beneficiary a minor under the Act, declared its determination to take the estate under its charge as the property of the minor, and directed that possession be taken of the property on its behalf. Subsequent to this declaration the executrix purchased a house in Calcutta for the estate and out of the assets of the estate. The officers appointed by the Court of Wards proceeded to execute its directions, they collected and appropriated rents, the collection, however, being made in the name of the executrix as mutation of names had not been effected, and they took over the establishment of the executrix in the absence of the executrix, without her consent and in spite of her protest. On a suit being instituted without notice under s. 424 of the Code of Civil Procedure by the executrix against the officers in their private individual capacity as trespassers, for a declaration of her title and for an injunction:—*Held*, the Court of Wards can only take possession of the estate of a minor, if he can be said to be its "proprietor" within the meaning of the Court of Wards Act. The residuary legatee does not become "proprietor" until, after administration has been completed, and the residue ascertained and made over to him. The Court of Wards has no power under its Act to override the wishes of testators and proprietors

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generally. The Court of Wards has no power to determine whether there had been mal-administration by the executrix, and on its own determination to take possession of the property vested in the executrix. Mal-administration by the executrix was no ground for taking possession by the Court of Wards. In the circumstances of the case, possession of the estate really remained with the plaintiff and there was a continuing trespass against which the plaintiff was entitled to relief by way of injunction. Section 424 of the Code of Civil Procedure has no application where public officers are sued not in an admitted official capacity but as individual trespassers, nor so far as a suit seeks for relief by way of injunction. The High Court may entertain an action in respect of immoveable property, provided a portion of such property is within the jurisdiction. It is not necessary that the cause of action should arise within the local limits, or be specifically with reference to the portion of the property within those limits. An acquisition of property for the estate, by the executrix, by purchase out of the assets of the estate formed part thereof, although the purchase took place after the declaration of the Court of Wards taking over charge of the estate. A trespass committed by order of a higher official is in substance the act of that official, who can be sued as a trespasser. *GANODA SUNDARY CHAUDHURANI v. NATINI RANJAN RAHA (1908)* I. L. R. 36 Cal. . . . 28

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Witness—Statement of witness taken by the police during investigation and recorded in the Special Diary—Copies of such statements when to be given to the accused—Criminal Procedure Code (Act V of 1898; ss. 161 and 162—Practice. Where the trying Magistrate, at the instance of the accused, called for the statements of certain prosecution witnesses recorded by the police during their investigation in the special diary and then returned them to the police without recording an order that he did not think it expedient in the interests of justice to furnish the accused with a copy, and also disallowed an application to summon a defence witness:— <i>Held</i> , that the Sessions Judge should re-hear the appeal and examine this witness, and send for the statements recorded by the police and, if he found anything in them of advantage to the accused, that he should also summon the witnesses who made them and allow cross-examination after supplying the accused with a copy of their statements. <i>SALT v. EMPEROR</i> (1909) I. L. R. 36 Calc.	560
Witnesses : See APPELLATE COURT	838
Words :—"Artificer, Workman or Labourer" : See WORKMEN'S BREACH OF CONTRACT ACT (XIII OF 1859) s. 1	917

"Chowdhuri" : See HINDU LAW	590

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Words— <i>concl.</i>	
"Having first recorded grounds of his belief": See	
TRESPASS	433

Workmen's Breach of Contract Act (XIII of 1859)—*Preamble and s. 1*
 —"Artificer, Workman or Labourer"—Person entitled to work by contract and to percentage of profits—*Fraudulent breach of contract—Neglect or refusal to perform work—Refusal to work for alleged breach of contract by employer.* A person entitled under his agreement to have the stipulated work performed on the contract system in lieu of pay, and to receive a percentage on the profits as commission with an annual statement of the accounts of the business, a percentage of the reserve fund as commission in the event of the firm being wound up, and a similar percentage on

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Workmen's Breach of Contract Act (XIII of 1859) — <i>concl.</i>	
sums drawn from such fund at any time, is not an "artificer, workman or labourer" under the Act. The neglect or refusal, wilfully and without lawful or reasonable excuse, to perform work or get it performed, as mentioned in s. 1 of the Act, must amount to a fraudulent breach of the contract, as stated in the preamble to it. Where, therefore, a person left his employment owing to his employer's failure to furnish him with a statement of the business accounts and to pay a percentage of the profits, in accordance with the terms of the contract:— <i>Held</i> , that there was no such neglect or refusal as to bring him within the scope of s. 1 of the Act. PURNA CHANDRA NANDAN v. TABACK NATH CHANDRA (1900) I L R. 36 Cal	917

